Supreme Court, U.S.
FILED
JAN 17 2008
OFFICE OF THE CLERK

81

No. 07-958

In the
Supreme Court of the United States

MELVIN E. HUNTER, et al.,

Petitioners,

v.

JAMES ALLEN HYDRICK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1382
Fax: (415) 703-5480
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a civil rights complaint against government actors sued in their individual capacities state a claim under Federal Rule of Civil Procedure 8(a)(2) if it alleges only that "defendants' policies, practices and customs" resulted in plaintiffs' constitutional deprivations, without pleading any facts regarding the form, manner, or content of the "policies, practices and customs," or regarding the roles of the individual defendants in creating, promulgating or executing those "policies, practices and customs?"

PARTIES TO THE PROCEEDING

Petitioners are Melvin E. Hunter, John De-Morales, Craig Nelson, and Grenda Ernst. Each of petitioners is a current or former administrative employee of Atascadero State Hospital (ASH), a state-run, all-male, maximum security psychiatric hospital in California.

Respondents are James Allen Hydrick, Joseph Carrocci, Roy Alvin Davis, Kenneth Herman, Michael Ray Jackson, Trell James Mercer, Jr., Terry Myers, Alan Rigby, and Frank Sisneroz. Each of respondents was, at one time, civilly committed at ASH after having been determined to be a sexually violent predator under state law.

The listing of parties in the caption in the Ninth Circuit court of appeals' decision, reported at 500 F.3d 978, was based on the original complaint filed in the case, rather than the operative Second Amended Complaint. *See* App., *infra*, 67a-68a.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
FEDERAL RULE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	9
A. Review Is Warranted Because the Circuits Have Adopted Widely Varying Practice with Respect to Pleading Requirements in Cases Against Government Actors	12
B. The Court of Appeals' Decision to Allow the Case to Go Forward Despite Its Substantial Pleading Defects Conflicts with Rule 8(a)(2) and This Court's Precedent	28
C. The Court of Appeals' Decision Could Severely Undermine Government Officials' Ability to Avoid the Time and Expense of Litigation in Cases in Which They Are Likely Ultimately Entitled to Qualified Immunity	33
CONCLUSION	36

TABLE OF CONTENTS – Continued

Page

APPENDIX A, Order and Opinion of the Ninth Circuit Court of Appeals, filed on August 30, 2007 ..... 1a

APPENDIX B, District Court's Order Denying Petitioners' Motion to Dismiss, filed on August 26, 2003 ..... 65a

APPENDIX C, Second Amended Complaint for Injunctive and Declaratory Relief, filed August 14, 2002 ..... 67a

TABLE OF AUTHORITIES

Page

CASES

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) ..... *passim*

Epps v. Watson, 492 F.3d 1240 (11th Cir. 2007) 13

Evancho v. Fisher, 423 F.3d 347 (3d Cir. 2005) 18, 19, 21, 22, 23

George v. Smith, 507 F.3d 605 (7th Cir. 2007) 21

Goad v. Mitchell, 297 F.3d 497 (6th Cir. 2002) 18

Gomez v. Toledo, 446 U.S. 635 (1980) 29

Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003) 13, 14, 16, 17, 18

Higgs v. Carver, 286 F.3d 437 (7th Cir. 2002) 18, 20, 21

Hood v. Chicago, 927 F.2d 312 (7th Cir. 1991) 27

Hunter v. Bryant, 502 U.S. 224 (1991) 34

Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) 18, 19, 25

Lanier v. Bryant, 332 F.3d 999 (6th Cir. 2003) 27

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 13, 28

Milligan v. City of Newport News, 743 F.2d 227 (4th Cir. 1984) 27

Mitchell v. Forsyth, 472 U.S. 511 (1985) 11, 28, 34

Moya v. Schollenbarger, 465 F.3d 444 (10th Cir. 2006) 18, 19, 25

TABLE OF AUTHORITIES – Continued

Page

Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002) 13, 14, 15, 16

Redondo-Borges v. United States Dep't of Housing & Urban Dev't, 421 F.3d 1 (1st Cir. 2005) 18, 26

Saucier v. Katz, 533 U.S. 194 (2001) 34

Springdale Educ. Ass'n v. Springdale School Dist., 133 F.3d 649 (8th Cir. 1998) 19, 27

Thomas v. Independence Twp., 463 F.3d 285 (3d Cir. 2006) 23

Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001) 18, 19

Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993) 24, 25

STATUTES

28 U.S.C. § 1254(1) 1

Cal. Welf. & Inst. Code
§ 6600(a)(1) 3

§ 6600.05(a) 3

§ 6600.05(b) 3

COURT RULES

Fed. R. Civ. P.
8 ..... 11, 13

8(a) 9, 10, 20

8(a)(2) 2, 10, 28, 30, 35

TABLE OF AUTHORITIES – Continued

Page

11(b)(3).....34

12(b)(6).....7, 8, 15, 19, 21

12(e).....19

OTHER AUTHORITIES

Administrative Directive No. 602 5

Petition for Writ of Certiorari *Hasty v. Iqbal*, No. 07-827 (U.S. December 17, 2007).....11, 20

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of California, on behalf of Melvin Hunter, Jon Morales, Craig Nelson, and Grenda Ernst, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-64a) is reported at 500 F.3d 978. Earlier (superseded) versions of this opinion were reported at 449 F.3d 978 and 466 F.3d 676. The opinion of the district court (App., *infra*, 65a-66a) is unreported.

JURISDICTIONAL STATEMENT

The decision under review was issued on August 30, 2007 (App., *infra*, 1a-64a). On that date, the court of appeals also denied a petition for rehearing and rehearing en banc. On November 28, 2007, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including December 28, 2007. On December 14, 2007, Justice Kennedy further extended the time to file to and including January 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 8(a)(2) provides: a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."

STATEMENT

1. Petitioners are the current Executive Director, two former Executive Directors, and a former Clinical Administrator at Atascadero State Hospital (ASH), a state-run, all-male, maximum security psychiatric hospital in California.[1] They are defendants in the underlying lawsuit and have been sued in their official and personal capacities.

Respondents, plaintiffs in the underlying lawsuit, are nine sexually violent predators (SVPs), as defined by state law, who were formerly civilly committed in ASH. They represent a certified class of all "individuals who are or were confined pursuant to California

[1] Petitioner Jon DeMorales is the current Executive Director of ASH. He served in that capacity from November 1990 through July 2000, and then came out of retirement in June 2007 to serve again in that capacity. The other petitioners are Melvin E. Hunter, Executive Director, July 2001 – June 2007; Craig Nelson, Executive Director, July 2000 – September 2001, and Senior Psychologist, September 2001 – May 2003; and Grenda Ernst, Program Director, September 1996 – December 2000, and Clinical Administrator, December 2000 – December 2003.

Welfare & Institutions Code §§ 6600 *et seq.*, at Atascadero State Hospital on or after September 2, 1997," a class alleged to consist of at least 250 persons. Under California's SVP Act, an SVP is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600(a)(1). Respondents allege constitutional violations in the civil commitment of SVPs in ASH.

Until relatively recently, ASH was the sole facility in California to house virtually all SVPs in the state. In 1998, the Legislature designated ASH to temporarily house and treat SVPs until a permanent facility could be built. *See* Cal. Welf. & Inst. Code § 6600.05(a). A permanent facility, Coalinga State Hospital, opened in 2005, and virtually all SVPs in California now reside there. *See id.*, § 6600.05(b). Notwithstanding these developments, petitioners remain potentially liable in their individual capacities to the class of SVPs formerly housed at ASH.

2.a. The underlying lawsuit was filed on June 28, 1999 by a group of 199 SVPs housed at ASH, proceeding pro per, against 70 individual defendants. The district court subsequently directed plaintiffs to file a first amended complaint and excused all defendants from answering the original complaint. Three defendants (petitioners DeMorales, Ernst, and Nelson) filed a motion to dismiss the first amended

complaint, which the district court denied. On or about April 13, 2001, the district court certified a class action pursuant to the parties' stipulation.

b. On August 14, 2002, a smaller group of plaintiffs (the nine respondents herein) filed the operative second amended complaint that named only six defendants (including all four petitioners herein).

Respondents do not allege that the four petitioners, themselves, directly mistreated them. Instead, the operative complaint contains ten separate causes of action that seek to premise defendants' liability on some unspecified involvement with the establishment and enforcement of unspecified "polices, practices and customs." *See, e.g.*, App., *infra*, 93a, ¶¶ 71-72 (defendants violated First and Fourteenth Amendments through the existence of "policies, practices and customs" that interfere with respondents' abilities to access the courts and encourage retaliation against class members for participation in lawsuits); *id.* at 94a, ¶ 75 (defendants violated Fourth and Fourteenth Amendments through the existence of "policies, practices and customs" that subject SVPs to unreasonable searches and seizures and the unreasonable use of force); *see also id.* at 94a-95a, ¶ 78 (Ex Post Facto Clause); *id.* at 95a, ¶ 81 (Double Jeopardy Clause); *id.* at 96a, ¶ 84 (Eighth and Fourteenth Amendments); *id.* at 97a, ¶ 87 (procedural due process); *id.* at 98a, ¶ 90 (substantive due process); *id.* at 99a, ¶ 93 (equal protection); *id.* at 99a-100a, ¶¶ 96-99

(Sixth and Fourteenth Amendments); 100a, ¶ 102 (right to privacy).[2]

The complaint makes no attempt to differentiate between defendants, or to specify any defendant's role in establishing or applying the purported "policies, practices and customs" at issue. In addition, the complaint does not identify or describe the purported "policies, practices and customs" that purportedly led to violation of respondents' rights. No information is provided as to the form or content of the policies, practices or customs; when or how they were promulgated; or how they are implemented.

The complaint only identifies one written policy at ASH, Administrative Directive No. 602. App., *infra*, 83a-84a, ¶¶ 32-37. According to the complaint, Administrative Directive No. 602 lists the "rights of patients involuntarily detained," including "the right to treatment and services that are provided in ways least restrictive to personal liberty; the right to dignity, privacy, and humane care; the right to be free from harm including excessive restraints, isolation, medication, abuse or neglect; the right to be free of medication as a form of punishment or for staff

---

[2] *See also id.* at 72a-73a, ¶ 14 (broadly alleging that defendants "establish(ed) and enforce(d) the policies, practices and customs that determine the programming, treatment, location and conditions of confinement for all SVPs at all times relevant to this suit"); *id.* at 73a, ¶ 17 (alleging that "[d]efendants' policies, practices and customs have created punitive and improper conditions that infringe on the rights of SVPs").

convenience; the right to prompt medical care . . . ; and the right to be free from hazardous procedures." *Id.* at 83a, ¶ 33. Thus, by its terms, Administrative Directive No. 602 supports rather than undermines the rights that respondents claim are at issue in the lawsuit.[3]

c. On February 21, 2003, petitioners moved to dismiss the SAC on several grounds, including qualified immunity and respondents' failure to plead their claims with sufficient specificity and particularity, or for a more definite statement. The district court denied petitioner's motion in one sentence: "It is ordered that the entire motion to dismiss, including the part deemed to be a motion to decertify the class, be, and hereby is, denied." App., *infra*, at 65a. Petitioners filed a timely appeal to the Ninth Circuit Court of Appeals.

3. In a divided decision issued on August 30, 2007, the Ninth Circuit affirmed in part and reversed in part the district court's order. The court held that petitioners were entitled to qualified immunity as a matter of law with respect to the First, Eighth, and Fourteenth Amendment (procedural due process)

---

[3] The complaint also alludes to a written Patient Access System Manual, App., *infra*, 85a, ¶¶ 39-40, which authorizes reductions in patient's "Access Levels" in circumstances that respondents contend may be punitive. This Manual is not relevant to the issues before this Court because the Ninth Circuit's opinion directed dismissal of respondents' claims premised on such reductions in access level. *Id.* at 26a, 32a-35a.

claims. However, the court affirmed the district court's order denying dismissal with respect to respondents' remaining claims.

At the outset, the court of appeals recognized that it was being required to rule on petitioners' 12(b)(6) motion without having sufficient allegations in the pleadings to assess each petitioner's role in the alleged violations:

> [B]ecause the Defendants' motion is framed as a motion to dismiss, we must evaluate the merits of the Defendants' qualified immunity defense before we know the full extent of the alleged abuses at Atascadero, or the reason behind the Atascadero policy, or the *level of involvement that Defendants had in creating the conditions at Atascadero*.

App., *infra*, at 10a (emphasis added). Nonetheless, the court held that respondents were entitled to take discovery to flesh out their allegations:

> At this stage of pleading, . . . the Plaintiffs' [sic] need not specifically delineate how each Defendant contributed to the violation of their constitutional rights. Indeed, we do not see how, prior to discovery, they *could* plead the individual roles of each state officer with any more specificity.

Id. at 16a.

The court of appeals continued to acknowledge the undeveloped nature of the pleadings in its discussion of each individual cause of action. Perhaps the

clearest, but by no means only, example of this occurred in the court's analysis of respondents' claim that petitioners impeded their access to counsel and to the courts in violation of the Sixth and Fourteenth Amendments:

> Such a fact specific inquiry can hardly be undertaken at this point, *when it is not clear what the Defendants have done to impede access to the courts, or why they have done so, or how the Defendants' actions have affected the Plaintiffs' right of access.* Nonetheless, the Plaintiffs *may* be able to state a violation of clearly established law congruent with their allegations, and we affirm the district court's order denying Defendants' Rule 12(b)(6) motion to dismiss as to Plaintiffs' Tenth claim based on access to courts.

App., *infra*, at 45a (emphasis added). And again, with respondents' right-to-privacy claim, the court explained:

> Again, this calls for a highly factual inquiry where the facts are not fully developed. . . . Such facts are simply not available to us at this stage of the proceedings. . . . Nonetheless, the Plaintiffs *may* be able to state a violation of clearly established law congruent with their allegations, and as such we will not dismiss their claim under Rule 12(b)(6).

Id. at 46a (emphasis added).

In dissent, Judge Trott strongly disagreed with his colleagues' approach to the pleadings. App., *infra*,

at 59a-62a. He specifically took issue with his "colleagues' assertion that because the facts are not yet developed, it is too early in this lawsuit to dismiss" on the basis of qualified immunity. *Id.* at 59a. He noted that, under this Court's precedent, qualified immunity is not merely an immunity from being sued, or even an immunity from standing trial, but rather is intended to give government officials a right "'to avoid the burdens of "such *pretrial* matters as discovery . . . , as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'"'" *Id.* at 60a.

REASONS FOR GRANTING THE PETITION

This Court should grant review to address and resolve the considerable variation among the circuits regarding the specificity of pleading necessary to state a claim in individual-capacity civil rights lawsuits against government actors. The Fifth and the Eleventh Circuits, alone among the circuits, require plaintiffs in such cases to satisfy a heightened pleading standard. In contrast, the remaining circuits all require only some version of "traditional" or "generic" notice pleading under Federal Rule of Civil Procedure 8(a), but even among these circuits there is considerable variation in what is permitted.

That said, the Ninth Circuit's published decision in this case represents a significant and unwarranted departure from the level of specificity even within those circuits that require only traditional notice

pleading. In this case, the Ninth Circuit held that a plaintiff may state a claim against a government official merely by alleging that the official has some unspecified connection to an unidentified "policy, practice or custom" that somehow indirectly led to a violation of plaintiff's rights, without even alleging any facts regarding the content of that policy, practice or custom, or how it was promulgated. As published cases from both the "heightened pleading" and "notice pleading" circuits confirm, the Ninth Circuit's decision in this case would have come out differently than it did had the case been brought in virtually any other circuit.

Review is also warranted because the Ninth Circuit's decision conflicts with Federal Rule 8(a) and with this Court's precedent, notably its most recent analysis regarding the requirements for notice pleading. *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007). Without allegations regarding the content, form, and method of implementation of the alleged "policies, practices or customs" at issue, or defendants' respective roles with respect to those "policies, practices or customs," the complaint fails to plead respondents' "entitle[ment] to relief" as required by Rule 8(a)(2), and it fails to put petitioners on notice of the substantive nature of the claims against them. Given other explanations for the conduct of the subordinates who actually interacted with members of the plaintiff class (and whose direct interactions are the basis for the suit), the complaint does not, as pled, cross from speculation to plausibility.

If unreviewed, the Ninth Circuit's decision will likely result in increased naming of a broader range of government defendants in lawsuits (from line workers on up to governors), based on plaintiffs' mere speculation that, if discovery goes forward, some evidence of a "policy, practice or custom" may eventually emerge to supply a basis for liability. At the same time, such wholly conclusory allegations will make it more difficult for state actors to obtain an early exit from lawsuits based on their qualified immunity, since such pleading deprives defendants of the facts needed to prepare a defense. A pleading approach that expands the number of government actors subject to litigation and simultaneously makes it harder for them to defend themselves is flatly inconsistent with the entire premise of qualified immunity. This Court has long held that an official's qualified immunity is not merely a defense to liability, but a defense to suit, and that as such, courts should facilitate early dispositions of the defense. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The issues raised in this petition are likely to recur, and in fact are similar to those raised in another petition already pending before this Court. *See* Petition for Writ of Certiorari, *Hasty v. Iqbal*, No. 07-827 (U.S. December 17, 2007). *Iqbal* also concerns the pleading standard that applies in individual-capacity civil rights lawsuits, in that case against federal rather than state officials. Similar to the present petition, *Iqbal* raises the question of whether a complaint satisfies Federal Rule of Civil Procedure 8

where it lacks specific factual allegations regarding the defendant's role in plaintiff's alleged injuries. In addition, the present case calls into question a recurring practice in civil rights claims, namely plaintiffs' practice of pleading an undefined "policy, practice or custom" in lieu of specific allegations of wrongdoing. Thus, this case presents a particularly efficient vehicle for clarifying the pleading standard in civil rights suits against government officials sued in their individual capacities.

A. Review Is Warranted Because the Circuits Have Adopted Widely Varying Practice with Respect to Pleading Requirements in Cases Against Government Actors.

In its decision, the Ninth Circuit permitted claims against state actors, who held purely managerial and executive positions, to move forward based on the barest of allegations: that "defendants' policies, practices and customs" resulted in plaintiffs' constitutional deprivations. The Ninth Circuit did so despite the fact that the complaint does not identify the content or requirements of those policies, practices and customs. It does not identify the form they take, or how they are (or were) promulgated. It does not allege how these policies, practices and customs are applied or enforced. The complaint does not even address, as the court of appeal recognized, each defendant's role in connection with the development, implementation or application of these policies, practices and customs. App., *infra*, at 10a, 16a, 45a.

This Court's review is warranted to clarify the specificity of pleading that is required to state an individual capacity civil rights claim against government defendants. There is substantial variation among the circuits regarding pleading requirements in this context.

1. Two circuits – the Fifth Circuit and the Eleventh Circuit – expressly require that individual capacity civil rights complaints against governmental officials satisfy a "heightened pleading" standard that is more rigorous than the "generic pleading requirements" of rule 8. *Oliver v. Scott*, 276 F.3d 736, 741, 742 (5th Cir. 2002); *see also Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003).[4] Both circuits reject "conclusory" allegations as a basis for liability, and instead require plaintiffs to support their claims with allegations about the specific conduct by each individual defendant that purportedly gave rise to the constitutional violation. *Oliver*, 276 F.3d at 741-43; *Gonzalez*, 325 F.3d at 1235-36.

Applying their pleading standards, both circuits have held insufficient bare bones pleadings in lawsuits brought against governmental agents arising from their supervisory or policymaking positions. The two cases described below are on point, in that they

---

[4] The Eleventh Circuit recently has held that its heightened pleading standard survived this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). *Epps v. Watson*, 492 F.3d 1240, 1242-43 & n.2 (11th Cir. 2007).

both dealt with efforts to impose liability on governmental actors that were themselves somewhat removed from the alleged wrongful acts, based on wholly conclusory allegations about the existence of a "policy" (*Oliver*) or the exercise of supervisory power (*Gonzalez*). That the outcomes were so different from the present case underscores the practical consequences of leaving divergent standards unaddressed.

a. In *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002), the Fifth Circuit affirmed dismissal of the complaint against various state and local officials on the ground that plaintiff had failed adequately to plead the form or content of the "policy" that led to the alleged violation of plaintiff's rights. Plaintiff claimed that the use of female prison employees to conduct strip searches and to observe male inmates showering and using the bathroom violated his right to privacy, right to freedom from unreasonable search and seizure, and right to equal protection under Fourth and Fourteenth Amendments. Plaintiff sued two state correctional officials, Wayne Scott and Gary Johnson, in their individual capacities, and several prison personnel (e.g., a warden, individual guards) in both their individual and official capacities. Plaintiff did not allege that Scott and Johnson themselves participated in or directed the challenged acts. Instead, plaintiff sought to hold them individually liable on the ground that the strip searches and cross-sex monitoring were done "pursuant to" policies promulgated by the Texas Department of Criminal Justice-State Jail Division (TDCJ). *Id.* at 742.

Applying a heightened pleading requirement, the court of appeals affirmed dismissal of the complaint against the two state officials. 276 F.3d at 742-43. The court recognized, at the outset, that state officials may be liable for implementing a standard that is itself a "repudiation of constitutional rights" and "the moving force" behind a constitutional violation. *Id.* at 742. But, the court held, Oliver had failed to plead the existence of a constitutionally defective policy with any specificity:

> Oliver's complaint fails to identify specific policies or to explain how they permitted or possibly encouraged cross-sex strip searches and monitoring. He must plead such specific facts to survive a rule 12(b)(6) motion to dismiss claims against Scott and Johnson in their individual capacities.

Id. The court noted that the *only* policy identified in the litigation, TDCJ Administrative Directive 3.22, generally mandated that same sex gender strip searches be used "when possible," and provided that a warden could approve opposite sex searches only under "extraordinary circumstances." *Id.* at 742-43. The court recognized that this policy was not unconstitutional per se, and that Scott and Johnson could not be held vicariously liable if local personnel violated it. *Id.* at 743.

The court *also* held that dismissal was proper with respect to the claim against the warden under the traditional pleading standard that the Fifth Circuit applies in official-capacity lawsuits – again,

because plaintiff failed to plead the contours of the "policy" at issue with sufficient specificity. 276 F.3d at 742. The court explained: "[t]he complaint alleges that the warden acted 'pursuant to' TDCJ policies, but fails to identify any specific policy or explain how those policies led to constitutional violations." *Id.* Accordingly, in the Fifth Circuit, bare bones allegations of the existence of a "policy" do not suffice under *either* a traditional notice pleading standard *or* a heightened standard as a basis for governmental liability. The form, content and application of the policy must be pled.

b. The Eleventh Circuit reached a similar result and affirmed dismissal of a complaint against various federal officials in *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), on the ground that plaintiffs had failed to plead supervisory liability with sufficient particularity. In *Gonzalez*, relatives of Elian Gonzalez claimed various constitutional violations arising from actions taken by federal agents while forcibly removing Elian from plaintiffs' home. Plaintiffs sued, *inter alia*, Attorney General Janet Reno, INS Commissioner Doris Meissner, and Deputy Attorney General Eric Holder in their individual capacities. The federal district court denied defendants' motion for dismissal based on qualified immunity, concluding that the complaint alleged the requisite causal connection between supervisory actions of defendants and violations by agents on the scene. 325 F.3d at 1233. The district court relied on allegations in the complaint to the effect that the agents on the scene "'acted under

the personal direction of Defendants JANET RENO, DORIS MEISSNER AND ERIC COLDER.'" *Id.*

The court of appeals reversed. The court explained that a supervisor may be held liable only if he or she personally participated in alleged violation or there is a causal connection between the actions of the supervising official and the alleged constitutional violation. 325 F.3d at 1234. The Eleventh Circuit reached this result despite allegations that defendants "'personally directed and caused a paramilitary raid upon [their] residence, and had actual knowledge of, and agreed to, and approved of, and acquiesced in, the raid'"; that the agents on the scene acted "'under the personal direction'" of defendants and with their "'knowledge, agreement, approval, and acquiescence'"; and that defendants "'personally participated in the constitutional violations, and there was clearly a causal connection between their actions and the constitutional deprivation.'" *Id.* at 1235. Nonetheless, the court held that these allegations were too conclusory to support liability:

> Plaintiffs state that there is a causal connection between these defendants' acts and the excessive force used by the agents on the scene, but they do not allege any facts to support this causal connection. Plaintiffs do not allege that these defendants directed the agents on the scene to spray the house with gas, break down the door with a battering ram, point guns at the occupants, or damage property. Given the presumption of legitimacy accorded to official conduct, it would be

> unreasonable to draw from the alleged facts the inference that the supervisory defendants directed the agents on the scene to engage in the unconstitutional activity with which they are charged.

Id. at 1235-36.

2. In contrast to the Fifth and Eleventh circuits, virtually all the other circuits require only traditional notice pleading in civil rights suits against governmental actors. *See, e.g., Redondo-Borges v. United States Dep't of Housing & Urban Dev't*, 421 F.3d 1, 9 (1st Cir. 2005); *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *petitions for cert. filed* (U.S. Dec. 12 & 17, 2007) (Nos. 07-798, 07-827); *Evancho v. Fisher*, 423 F.3d 347, 349 (3d Cir. 2005); *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001); *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002); *Moya v. Schollenbarger*, 465 F.3d 444, 454-55 (10th Cir. 2006). Even among these circuits, however, there are significant variations in the courts' decisions. Further, even taking into account those variations, the Ninth Circuit's decision in the present case remains decidedly out-of-step: other circuits are not willing to sanction the type of pleading that was permitted here even under traditional notice pleading.

With the possible exception of the Second and Seventh Circuits, the remaining circuits generally reject the notion that a civil rights complaint against a governmental actor may rest on wholly conclusory pleadings. *See, e.g., Redondo-Borges*, 421 F.3d at 9

("Even within the generous confines of notice pleading, courts must continue to 'eschew . . . reliance on bald assertions [and] unsupportable conclusions.'" (quoting *Chonrgris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987)); *Evancho*, 423 F.3d at 349 (affirming dismissal of civil rights complaint against state attorney general where plaintiff failed to adequately plead that the Attorney General was "personally involved in her transfer to a lesser position" in purported violation of her civil rights); *Trulock*, 275 F.3d at 405 n.9 ("'The presence [ ] of a few conclusory legal terms does not insulate a claim from dismissal under Rule 12(b)(6) when the facts alleged in the complaint' do not support the legal conclusion."); *Moya*, 465 F.3d at 457 (conclusory allegations held insufficient); *see also Springdale Educ. Ass'n v. Springdale School Dist.*, 133 F.3d 649, 651 (8th Cir. 1998) ("At minimum, however, a complaint must contain facts sufficient to state a claim as a matter of law and must not be merely conclusory in its allegations.").

3. In contrast, the Second Circuit recently issued an opinion, in the wake of this Court's decision in *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007), suggesting that conclusory allegations may suffice to state a claim. *Iqbal*, 490 F.3d at 158. At the same time, it held that courts presented with such complaints should order the plaintiff to prepare a more definite statement under Rule 12(e) to enable defendants to raise meritorious qualified immunity defenses prior to discovery. *Id.* ("However, in order to survive a motion to dismiss under the plausibility

standard of *Bell Atlantic*, a conclusory allegation concerning some elements of a plaintiff's claim might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement."). A petition is now pending before this Court in *Iqbal*. Petition for Writ of Certiorari, *Hasty v. Iqbal*, No. 07-827 (U.S. December 17, 2007).[5]

4. The Seventh Circuit also seems willing to accept some conclusory allegations, although where it would draw the line is unclear. In *Higgs v. Carver*, 286 F.3d 437 (7th Cir. 2002), for example, it explained that a complaint may not be dismissed on the ground that it is "conclusory":

> A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts. The federal rules require (with irrelevant exceptions) only that the complaint state a claim, not that it plead the facts that if true would establish (subject to any defenses) that the claim was *valid*.

---

[5] The Second Circuit appeared (incorrectly) to view *Twombly* as authorizing a sort of "heightened," or at least "amplif[ied]," pleading standard in some, but not all, contexts. 490 F.3d at 157-58. The court then declined to view *Twombly* as authority for requiring a pleader to "amplify a claim with some factual allegations" in the qualified immunity context. *Id.* at 158. Respectfully, the Second Circuit misinterpreted *Twombly*, which petitioners understand merely elucidated the types of allegations that may be required to satisfy traditional notice pleading under Rule 8(a).

Nance v. Vieregge, 147 F.3d 589, 590-91 (7th Cir. 1998).

Id. at 439. However, in the same opinion, the court also acknowledged that the pleadings may not be so conclusory as to prevent defendants from preparing an answer, and provided an example of a pleading that would be too general to suffice. *Id.* (stating that claim that merely alleged that defendants retaliated against plaintiff "for filing a suit, without identifying the suit or the act or acts claimed to have constituted retaliation," would be "insufficient"). Further, the Seventh Circuit may require more specific allegations post-*Twombly*. *See George v. Smith*, 507 F.3d 605, 608 (7th Cir. 2007) (citing *Twombly* for proposition that complaint "must give enough detail to illuminate the nature of the claim and allow defendants to respond").

5. Even as compared to those circuits that apply some form of traditional notice pleading in individual capacity civil rights suits (as the Ninth Circuit purported to do), the Ninth Circuit's decision in this case is an outlier. A number of published decisions in the "notice pleading" circuits have affirmed or required dismissal under Rule 12(b)(6) of claims against governmental supervisors or policymakers that were pled with either equal or greater specificity than the complaint here.

Evancho v. Fisher, 423 F.3d 347 (3d Cir. 2005), expressly dealt with the pleading required to state a claim of supervisory liability. There, the court affirmed

dismissal of civil rights complaint against a state attorney general sued in his individual capacity where plaintiff failed to adequately plead that defendant was "personally involved in her transfer to a lesser position" in alleged violation of her civil rights. *Id.* at 349. Evancho had pled that the "'transfer was carried out by underlings reporting directly to the attorney general and/or by the attorney general himself for the explicit purpose of either setting [her] up for dismissal or, it [sic] that were not successful, making her work life so miserable as to force her resignation.'" *Id.* at 349-50. Defendant contended on appeal that the complaint "relie[d] solely on conclusory, boilerplate language." *Id.* at 351.

Affirming dismissal, the court of appeal agreed that defendant's role in plaintiff's injuries was insufficiently pled. The court noted that plaintiff failed to "allege any facts indicating that Attorney General Fisher personally directed her transfer"; that the complaint "does not contain even a remote suggestion that Attorney General Fisher had contemporaneous, personal knowledge of her transfer and acquiesced in it"; and that the complaint failed to allege dates of plaintiff's transfer, who ordered it, the means by which plaintiff was notified of the transfer, who told her of the transfer, and other facts. 423 F.3d at 353; *see also id.* at 354 (complaint insufficient to extent that it "merely hypothesizes that Attorney General Fisher may have been somehow involved simply because of his position as head of the Office of the Attorney General"). More specifically, the court

explained that none of the allegations in the complaint indicated that the Attorney General took any action to engineer her transfer:

> For example, [plaintiff] . . . does not allege when the Attorney General Fisher made the decision to transfer her, what steps he took to effect the transfer, whom he instructed to prepare the necessary transfer forms, or who signed those forms. Without addressing any of these facets of her transfer in her amended complaint, Evancho's allegation that Attorney General Fisher himself and/or his "underlings" carried out her transfer is simply a "bald assertion," which a court is not required to credit in deciding a motion to dismiss.

Id. at 354. Thus, the court "agree[d] with the Attorney General that Evancho's civil rights allegation as to him individually amounts to nothing more than conclusory, boilerplate language insufficient to show that she is or may be entitled to relief if her allegations are proven." *Id.*[6] Similar to the plaintiff in *Evancho*, respondents here seek to hold management level personnel personally liable for deprivations that respondents suffered at the hands of other personnel

---

[6] *See also Thomas v. Independence Twp.*, 463 F.3d 285, 298 (3d Cir. 2006) (dismissal required as to two defendants, Wendy Potts Fleegal and Sam M. Butler, because "[t]here are no allegations showing that [they] . . . were personally involved, through personal direction or actual knowledge, in the wrongs alleged in these claims.").

based solely on conclusory allegations – in this case, that defendants were somehow involved in some undefined "policy, practice or custom" that somehow resulted in unconstitutional conduct by others.

In *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993), the Second Circuit affirmed dismissal of a complaint against a district attorney sued in his individual capacity on the basis of acts performed by others in his office. Plaintiffs claimed that the district attorney promulgated a "policy or custom" regarding use of "face-to-face identifications" to identify robbery suspects, and that defendants' failure to protect a witness who participated in such an identification led to his death. The court rejected plaintiffs' effort to hold the district attorney liable on individual capacity basis: "The complaint contained only conclusory and speculative assertions with respect to Morgenthau, such as . . . that '[i]t is believed' that 'personnel in the District Attorney's Office' engaged in the alleged conduct 'pursuant to the practice, custom, policy and particular direction of Robert Morganthau [sic].'" *Id.* at 536. The court explained that these allegations do "not allege either explicitly or by assertion of facts from which such an inference could be drawn that Morgenthau personally

participated in the actions that plaintiffs challenge." *Id.*[7]

The Tenth Circuit rejected plaintiff's similarly conclusory allegations in a case arising from injuries sustained by a plumber that led to his being fired. *Moya v. Schollenbarger*, 465 F.3d 444 (10th Cir. 2006). In *Moya*, plaintiff claimed he was physically injured as a result of "'hostile work conditions'" to which defendants, three officials of the New Mexico State Fair, "'deliberately and systematically exposed'" him in retaliation for his having spoken out on work-related issues. *Id.* at 446. In response to a court order, plaintiff amended his complaint to add allegations regarding the purported wrongdoing of each of the defendants: essentially, that they ignored complaints and reports made by plaintiff and that they created and facilitated the violations against which he allegedly spoke out. *Id.* at 447, 456. The court of appeals affirmed dismissal of the complaint under the "normal" notice pleading standard. *See id.* at 455. The court held: "Mr. Moya's general assertions that he was 'exposed' to a 'hostile work environment' and that Defendants 'imposed' 'hostile work conditions' on him are merely conclusory allegations . . . and are therefore insufficient by themselves to state a First Amendment retaliation claim." *Id.* at 457.

---

[7] Although this case has not been overruled, it is unclear to what extent it remains good law in light of the Second Circuit's holding in *Iqbal*, discussed *supra*.

The First Circuit, in *Redondo-Borges v. United States Department of Housing & Urban Development*, 421 F.3d 1, 9 (1st Cir. 2005), rejected "naked" allegations of wrongdoing, of similar level of generality to those at issue in the present case, as adequate in a civil rights complaint brought by a government contractor. Plaintiffs alleged that they were "debarred" from contracting in violation of their right to procedural due process. However, the court held that "plaintiffs have not alleged sufficient facts to establish the underlying debarment." *Id.* at 8. The complaint "does little more than describe what the plaintiffs call a suspension," but "does not anchor this pejorative term in any supporting facts." *Id.* at 8-9. "'[I]n a civil rights action as in any other action subject to notice pleading standards,'" the court explained, "'the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why.'" *Id.* at 9 (quoting *Educadores v. Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 68 (1st Cir. 2004)). Accordingly, "[w]e . . . reject the naked mention of an undocumented suspension as a possible source of a constitutionally protected interest." *Id.* Had the Ninth Circuit adopted this approach, it would have rejected the naked mention of an undefined, undocumented "policy, practice or custom" as a basis for liability against defendants here.

These cases demonstrate that the Ninth Circuit's approach to the conclusory allegations at issue here is seriously out-of-step with even those circuits that have rejected heightened pleading standards. The

Ninth Circuit's willingness to permit the complaint to go forward, absent any allegations regarding each specific defendant's role in their constitutional deprivations, and absent any description of the form, content, or application, of the purported "policy, practice or custom" to which they purportedly bear some connection, cannot be reconciled with any other court of appeals' analysis of similar issues.

6. The Ninth Circuit's decision also is inconsistent with how the courts of appeals have approached pleading of "policy and custom" allegations in cases seeking to impose municipal liability. The federal appellate courts have repeatedly refused to allow such claims to go forward on a bare assertion of the existence of a "policy or custom" that does not flesh out its contours. *See, e.g., Milligan v. City of Newport News*, 743 F.2d 227, 230 (4th Cir. 1984) (holding that there was "no properly pleaded allegation of the existence of a 'policy, practice or custom' upon which municipal liability" could be based); *Lanier v. Bryant*, 332 F.3d 999, 1007 (6th Cir. 2003) (holding that conclusory allegation that some police offers recorded plaintiff's phone conversations at the request of FBI was not sufficient to plead an "official policy or custom" of municipality that could be the basis for relief); *Hood v. Chicago*, 927 F.2d 312, 315 (7th Cir. 1991) ("We do not suggest that a complaint should plead evidence, but it should do more than plead in conclusory fashion that there was a 'policy and practice.'"); *Springdale Educ. Ass'n*, 133 F.3d at 651-52 (analyzing plaintiff's failure adequately to plead existence of

"official policy or widespread custom of the school district"). Significantly, the municipal liability cases have *all* rested on traditional notice pleading at least since this Court decided *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting a heightened pleading requirement for municipal liability cases under § 1983). *At least* the same level of pleading should be required in individual capacity suits brought against state and federal officials, where this Court has made clear the compelling need to facilitate early dismissal. *Mitchell*, 472 U.S. at 526.

B. The Court of Appeals' Decision to Allow the Case to Go Forward Despite Its Substantial Pleading Defects Conflicts with Rule 8(a)(2) and This Court's Precedent.

The court of appeals committed legal error, under this Court's precedent and Federal Rule of Civil Procedure 8(a)(2), in permitting the case to go forward based on the current state of the pleadings. The complaint merely premises petitioner's liability on their unspecified role in the establishment and enforcement of unspecified "policies, practices and customs." As such, the complaint fails to establish respondents' "entitle[ment] to relief" as required by Rule 8(a)(2), and it fails to put petitioners on notice of

the substantive nature of the claims against them so as to permit them to prepare a defense.[8]

The court of appeals' decision regarding the specificity of pleading required conflicts with this Court's decision last term in *Bell Atlantic Corporation v. Twombly,* 127 S. Ct. 1955 (2007). In *Twombly*, this Court held that a plaintiff must plead facts sufficient to render his or her claims of a violation of law "plausible." *See id.* at 1965-66. The Court rejected that a plaintiff may rely on wholly conclusory allegations in the complaint and then simply hope that, through the discovery process, the necessary facts would arise to support his or her claim. *Id.* at 1968-69.

At issue in *Twombly* was whether consumers in a putative class action had stated a claim for antitrust conspiracy under the Sherman Act against incumbent local exchange carriers (ILECs). The complaint alleged that the ILECs had engaged in certain parallel conduct unfavorable to competition, but provided no factual context in their pleadings to suggest the existence of an agreement per se. Instead, plaintiffs asserted that such an agreement could be inferred from defendants' parallel conduct: specifically, their common failure to pursue attractive business opportunities in

---

[8] To be clear, petitioners here are *not* arguing that in addition to actually *stating* a claim, plaintiffs must also plead additional facts to anticipate and rebut a qualified immunity defense. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant.").

contiguous markets in which they possessed competitive advantages. 127 S. Ct. at 1962. However, this Court recognized that there could be an alternative, nonnefarious, explanation for defendants' conduct (i.e., independent action), and that plaintiffs had failed to plead specific facts to rebut it. *Id.* at 1964-66.

This Court held that plaintiffs' pleadings were insufficient to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a)(2). That rule requires "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 127 S. Ct. at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). To satisfy Rule 8(a)(2), the Court held that a plaintiff must plead sufficient facts to establish "plausible grounds" to "raise a reasonable expectation that discovery will reveal evidence" of the material elements of the claim (i.e., in *Twombly*, the existence of an improper agreement). *Id.* at 1965. The Court explained that such a "plausibility" requirement serves to ensure that the "plain statement" required under rule 8(a)(2) has "enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966.

This Court underscored that, under Rule 8(a)(2), purely conclusory allegations will not suffice. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . ." 127 S. Ct. at 1964-65. Thus, the Court explained:

> An allegation of parallel conduct is much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief."

Id. at 1966. And again, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 1965 n.3.

In the present case, respondents seek to rest on pleadings that are as conclusory as those rejected in *Twombly*. Respondents do not allege any direct, active involvement by petitioners in the acts leading to the alleged deprivation of their constitutional rights (e.g., strip searches, reductions in privileges, contaminated food). Instead, they offer a "naked assertion" of the existence of "policies, practices and customs," with no specific factual allegations regarding the means, form or content of those policies, or defendants' individual roles in connection with those policies.

More specific allegations than these are required to move the complaint from the realm of mere speculation to plausibility. As in *Twombly*, an alternate explanation exists for any individual deprivations allegedly suffered by respondents: independent action by the persons with whom the SVPs interacted directly (e.g., treatment staff). Respondents may speculate that individual acts by individual staff members

are, in some sense, being coordinated by maliciously-intentioned policy-setters and policy-implementers at ASH. But without more specific factual allegations, the complaint offers only that speculation rather than plausibility. *See Twombly*, 127 S. Ct. at 1966 (holding that allegations that are "merely consistent with" the plaintiff's theory will not suffice when, "without some further factual enhancement [they] stop[ ] short of the line between possibility and plausibility of 'entitle[ment] to relief'").

Here, the court of appeals excused the conclusory nature of the pleadings on the basis of respondents' lack of access to information prior to discovery. *See, e.g.*, App., *infra*, at 16a ("[W]e do not see how, prior to discovery, they could plead the individual roles of each state officer with any more specificity."). That respondents lack such information, however, only further underscores the entirely speculative nature of their allegations. And *Twombly* rejected advancement of wholly conclusory pleadings drafted in the mere hope, through the discovery process, the necessary facts will be found. 127 S. Ct. at 1968.

Further, the Ninth Circuit's "need-for-discovery" justification for its ruling rings hollow in this case. The operative Second Amended Complaint was filed more than *three years* after plaintiffs initially brought suit. At the time the briefing on the motion had occurred, defendants had produced over 270,000 pages of documents, responded to 375 interrogatories and 240 requests for admissions, and participated in 34 depositions. Defendants' DeMorales, Ernst, Nelson

and Hunter Notice of Motion and Motion to Dismiss Second Amended Complaint or for a More Definite Statement at 17:13-18, *Hydrick v. Davis*, No. CV98-7167 (C.D. Cal. Feb. 21, 2003). That plaintiffs still were unable to plead any facts to support the existence of the challenged policies, practices and customs, and defendants' respective roles with respect to them, only confirms the unfounded and purely speculative nature of the pleadings.

C. The Court of Appeals' Decision Could Severely Undermine Government Officials' Ability to Avoid the Time and Expense of Litigation in Cases in Which They Are Likely Ultimately Entitled to Qualified Immunity.

The Ninth Circuit's decision, if unreviewed, will expand the potential range of government actors who are named in civil rights lawsuits while also severely undermining their ability to develop and assert valid qualified immunity defenses early in the life of the lawsuit. Specifically, it will invite plaintiffs to file complaints that cast the liability net as broad as possible in terms of the potential state actors they name – i.e., all supervisors and policymakers on up to the Governor, as plaintiffs did in this case – based on the mere speculation that such actors ultimately may be tied, through discovery to a "policy, practice or custom" that itself is merely speculated to exist. If the lawsuits survive the dismissal stage (as this one did), they will force government defendants into onerous discovery regarding whether speculated policies,

practices, and procedures exist, and if they do, whether each defendant had a role in creating or applying them.

Obviously, such an approach puts the proverbial cart before the horse, given the requirement that there be a good faith basis for any allegation in a pleading. Fed. R. Civ. P. 11(b)(3). Beyond this, such a "wait-and-see" approach to the case is inconsistent with the long-standing principle in cases against government actors: that qualified immunity is a defense to litigation rather than merely to liability.

This Court has long held that an official's qualified immunity is not merely a defense to liability, but an immunity from suit. *Mitchell*, 472 U.S. at 526. This is because the prospect of having to defend lawsuits may distract officials from their governmental duties, inhibit their decisionmaking, and deter qualified people from entering public service. *Id.* "[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)). For these reasons, "[w]here the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Indeed, this Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in the litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

Adherence to the pleading requirements in Rule 8(a)(2) is critical to ensuring that governmental officials are not forced into litigation unnecessarily – in this case based on pure speculation rather than concrete allegations of wrongdoing. As this Court recognized in *Twombly*, application of rule 8(a)(2)'s requirements can serve to expose deficiencies in a complaint before the parties and court have expended extensive time and money on the lawsuit. 127 S. Ct. at 1966. Similar to antitrust class actions, class actions against governmental officials can be prohibitively expensive. *Id.* at 1967. Accordingly, the following observation of this Court in *Twombly* applies with special force here, where both expense and policy militate strongly in favor of an early resolution of claims: "'[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

In sum, the Ninth Circuit should have rejected the pleadings as inadequate in this case consistent with the requirements of Federal Rule of Civil Procedure 8(a)(2) and the policy established by this Court in favor of early resolution of litigation against governmental actions who claim qualified immunity. This Court should grant review to clarify the pleading requirements in civil rights claims against government actors sued in their individual capacities, and to ensure that those pleading requirements are

consistent with the notion that qualified immunity is, more than a defense to liability, an immunity from litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DAVID S. CHANEY
Chief Assistant Attorney General

MANUEL MEDEIROS
State Solicitor General

GORDON BURNS
Deputy Solicitor General

DOUGLAS M. PRESS
Senior Assistant Attorney General

KARIN S. SCHWARTZ
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioners

January 17, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

No. 03-56712

James Allen Hydrick; David Lanphere; Shaundale Griffin; Frank Cisneros; Paul Pederson; Steven Robert Cerniglia; Gary Price; Daniel Mrowici; Kenneth Ciancio; Michael McClure; James Mata; Richard Bishop; Melvin Fields; Ron Lee; Leonard Pierre; Thomas Price; Jimmy Guthrie; Brian Kelly; Woodrow Jones; Vashon Jackson; Bruce Riley; Fred Scott; Dean Danforth; Sammy Page; James Peters; Grayling Mitchell; Carlos Saucedo; Anthony Dacayona; Charles Salas, et al.,
Plaintiffs-Appellees,

v.

Melvin E. Hunter, aka/Jon DeMorales; Craig Nelson; Grenda Ernst,
Defendants-Appellants, and
Robert McDaniel; Jerry Reynolds; Robert Penate; Samuel Robinson; Mark Mahhoney; Stephen Mayberg; Anita Judd; Michael Hughes; Jim Vess; Jack Townsend; Mark Palmer; Rocky Spurgeon; Arnie Gobbell; Jim Wiley; Mark Kalionzes; Elaine Sherrill; Glan Mikel; Jan Maire Alarcon; Baruch Margalit; William Knowlton; Diane Imram; Carmel Muller; Dale Arnold; Gabriella Paladino; Jean Dansereau et al.; William Charles Thiel; Robert Douglas Lefort; Arnold Schwarzenegger, Governor of California, Defendants.

Argued and Submitted April 5, 2005.
Filed Aug. 30, 2007.

Before: MARY M. SCHROEDER, Chief Judge, HARRY PREGERSON and STEPHEN S. TROTT, Circuit Judges.

Opinion by Judge PREGERSON; Partial Concurrence and Partial Dissent by Judge TROTT.

ORDER

The opinion in this case published at 466 F.3d 676 (9th Cir.2006), is withdrawn and replaced by the new opinion and dissent filed concurrently with this order.

Chief Judge Schroeder and Judge Pregerson voted to deny appellant's petition for panel rehearing and for rehearing en banc. Judge Trott voted to grant the petition for panel rehearing and recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. *See* Fed. R. App. P. 35(b). The petitions for panel rehearing and for rehearing en banc are DENIED.

No further petitions for rehearing will be entertained.

OPINION

PREGERSON, Circuit Judge:

Plaintiffs-Appellees represent a class of approximately six hundred civilly committed persons and those awaiting commitment at Atascadero State Hospital pursuant to California's Sexually Violent Predators Act ("SVP Act"). Plaintiffs allege that the conditions of their confinement violate their constitutional rights. They request declaratory and injunctive relief, as well as monetary damages. Defendants filed a motion to dismiss based largely on qualified immunity. The district court denied the motion, which the Defendants now appeal. We have jurisdiction under 28 U.S.C. § 1291; we affirm in part and reverse in part.

FACTUAL BACKGROUND

A. California's Sexually Violent Predators Scheme

The SVP Act defines an SVP as a person "convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others" i.e., is "likely [to] engage in sexually violent criminal behavior." Cal. Welf. &

Inst.Code § 6600(a).[1] The Department of Corrections and the Department of Mental Health evaluate convicts who committed predicate offenses at least six months before those convicts complete their sentences. *See id.* § 6601. If those two departments agree that the convict might qualify as an SVP, the district attorney (or counsel for the county in which the evaluated person was convicted) may file a petition for commitment. *See id.* § 6601(i). If a jury finds someone to be an SVP, that person is civilly committed for an indefinite period to commence *after* his criminal sentence is fulfilled. *Id.* §§ 6602-6604.

Once civilly committed, SVPs undergo a five-phase treatment program. Phase One consists of group sessions that educate the SVP about California's SVP Act. During Phase One, the SVP must attend and participate in the treatment sessions. If he does not, his access level[2] is reduced and he is not allowed to advance to Phase Two of the treatment program. In addition, an SVP's failure to attend or participate in treatment sessions is used against him

---

[1] Although the SVP Act is gender-neutral, there was only one female SVP at the time of the filing of this complaint. She was not housed at Atascadero, and was, therefore, not part of the Plaintiffs' class.

[2] Atascadero assigns everyone an access level that establishes access to various facilities and privileges. A Level 1 patient may not leave his unit without an escort. A Level 2 patient may leave his unit but cannot go to the courtyard or canteen. A Level 3 patient may have some access to the law library, canteen, courtyard, etc.

at future probable cause and confinement hearings. The SVP cannot advance beyond Phase One unless he signs a statement in which he acknowledges that he has an "illness" that requires "treatment." Plaintiffs allege that the signed statements are often used against them as admissions of illness in future probable cause and confinement hearings.

Phases Two through Five of the treatment plan involve "cognitive" treatment. This treatment includes viewing videos that depict violent or other inappropriate sexual activities while a repugnant odor or other unpleasant sensation is applied to elicit a negative association.

Each year, an SVP has a right to a "show cause hearing" to determine whether his commitment should be continued. *Id.* § 6605(a)-(b). If it is found that the SVP continues to be a danger to the health or safety of the community, the person is committed for two years from the date of the finding. *Id.* § 6605(e). Successive periods of commitment can be continued indefinitely, or until the SVP completes all five phases of treatment. Upon successful completion of Phase Five, the SVP is conditionally released under the supervision of the California Mental Health Department. According to the Plaintiffs, "only a handful of SVPs have been allowed into Phase Four and no SVP has progressed to Phase Five or ha[s]

been found to be ready for release under the treatment protocol."[3]

B. The Current Lawsuit

On September 2, 1998, the Plaintiffs filed a pro se class action, under 42 U.S.C. § 1983, against Defendants-Appellants Stephen Mayberg (Director of the California Department of Mental Health), Cal A. Terhune (Director of the California Department of Corrections), Jon DeMorales (former Executive Director at Atascadero State Hospital), Grenda Ernst (Clinical Administrator at Atascadero State Hospital), and Craig Nelson (Senior Psychologist Specialist at Atascadero State Hospital). The Plaintiffs sought injunctive and declaratory relief, as well as monetary damages, on the grounds that the policies and procedures governing their confinement and treatment at Atascadero State Hospital violate their constitutional rights.

In March 1999, the district court appointed pro bono counsel for the Plaintiffs. Counsel filed an amended complaint approximately five months later. The Defendants filed a motion to dismiss. The motion to dismiss raised Eleventh Amendment and qualified

---

[3] At oral argument it was alleged that, since the Plaintiffs filed their complaint, three (of over seven hundred) people committed under the Sexually Violent Predators Act have been released.

immunity defenses. The district court denied the motion.

The Plaintiffs filed a second amended complaint on August 14, 2002.[4] Both the first and second amended complaints alleged that the Defendants violated the Plaintiffs' rights by, inter alia: (1) force-medicating the Plaintiffs in non-emergency situations; (2) reducing the Plaintiffs' access levels and other privileges as a form of punishment for refusing to participate in treatment sessions or as retaliation for filing lawsuits; (3) putting the Plaintiffs in restraints for nonthreatening and/or nondisruptive conduct, including the refusal to participate in treatment or therapy; (4) subjecting the Plaintiffs to public strip-searches (sometimes while in four-point restraints); (5) failing to protect the Plaintiffs from abuse by other patients or by Atascadero employees; (6) failing to provide the Plaintiffs with constitutionally satisfactory conditions of confinement; (7) forcing the Plaintiffs to participate in treatment; and (8) denying the Plaintiffs adequate treatment, thereby converting the Plaintiffs' civil confinement to a de facto extension of their prison sentence.

The Defendants moved to dismiss the second amended complaint, on the same grounds presented

---

[4] The second amended complaint substituted Melvin Hunter, the current Executive Director at Atascadero State Hospital, for Jon DeMorales, the former Executive Director, but contained no substantive alterations.

in their first motion to dismiss. The district court again denied the motion. The Defendants timely appealed. The Defendants contend that the district court erred by failing to rule that the Eleventh Amendment, state abstention doctrine, or qualified immunity barr [sic] the Plaintiffs' suit.

ANALYSIS

A. Standard of Review

We review de novo the district court's denial of a motion to dismiss. *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir.2004). Immunity under the Eleventh Amendment presents a question of law, which we review de novo. *See Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir.2001). To determine if the Defendants are entitled to qualified immunity, we review de novo whether governing law was clearly established at the time of the alleged violation and whether the specific facts alleged constitute a violation of established law. *See Mabe v. San Bernardino County Dept. of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir.2001).

Although a district court's denial of a motion under Federal Rule of Civil Procedure 12(b)(6) is not ordinarily appealable, the denial of a claim for immunity is appealable before final judgment under the collateral order doctrine and is reviewed de novo. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.1999). All allegations of material fact are accepted as true and should be construed in the light most favorable to

Plaintiffs. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir.2000). A "complaint should not be dismissed [under Rule 12(b)(6)] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002).

We note, again, the special difficulty of deciding the motion to dismiss a Defendant on qualified immunity grounds at this stage. Under the notice pleading standard of the Federal Rules, plaintiffs are only required to give a "short and plain statement" of their claims. Fed.R.Civ.P. 8(a)(2). Thus, when reviewing the sufficiency of a complaint before receiving any evidence, our task is a limited one. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

As we recognized in *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir.2004), a motion to dismiss on qualified immunity grounds puts the court in the difficult position of deciding "far-reaching constitutional questions on a non-existent factual record." *Id.* at 957. While "government officials have the right . . . to raise . . . qualified immunity defense on a motion to dismiss, the exercise of that authority is not a wise choice in every case." *Id.* We find that applicable here. The policy justifying qualified immunity motions at this stage is to protect officers against the burden of discovery and pretrial motions. *See Behrens v. Pelletier*, 516 U.S. 299, 308, 116 S.Ct. 834, 133

L.Ed.2d 773 (1996). In this case, it appears that discovery was almost complete. The Defendants could have presented this as a motion for summary judgment, and we would have a more developed factual record to guide our decision. However, because the Defendants' motion is framed as a motion to dismiss, we must evaluate the merits of the Defendants' qualified immunity defense before we know the full extent of the alleged abuses at Atascadero, or the reason behind Atascadero policy, or the level of involvement the Defendants had in creating the conditions at Atascadero. As we decide the Defendants' motion, however, we are cautious not to eviscerate the notice pleading standard in suits where qualified immunity is at issue. *See Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir.2002).[5]

---

[5] With respect to our dissenting colleague, the Plaintiffs' complaint states more than "violations of extremely abstract rights." *See* Dissent at 10956 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). The Plaintiffs might be able to provide evidentiary support for their claims. Alternately, the Defendants might be able to justify their behavior, or at least convince us that their conduct was not clearly in violation of the Plaintiffs' rights. But the point of the Rule 12(b)(6) motion is not to evaluate the veracity of the Plaintiffs' allegations, or to speculate as to the Defendants' justifications for their actions. Rather, unless it is "beyond doubt" that a plaintiff cannot prove facts that would entitle him to relief, a Rule 12(b)(6) motion must be denied. *Navarro v. Block*, 250 F.3d 729 (9th Cir.2001). The standard is no different for a civil rights claim than for any other claim. *See Galbraith*, 307 F.3d at 1125-26.

B. The Law of the Case Doctrine

The Plaintiffs argue that under the law of the case doctrine, we should not reach the merits of the Defendants' appeal because the Defendants' second motion to dismiss was barred by the district court's denial of the Defendants' first motion to dismiss. The relevant facts are as follows: after the Plaintiffs filed their first amended complaint, the Defendants moved to dismiss for failure to state a claim and based on qualified immunity. The district court denied the motion, and the Defendants did not appeal. The Plaintiffs filed a second amended complaint, in which they changed only the name of one of the Defendants. The Defendants then moved to dismiss on grounds substantially similar to those in the previous motion. The district court again denied the motion. The Plaintiffs argue that the Defendants' second motion to dismiss is an impermissible "second bite at the apple" and should be dismissed under the law of the case doctrine.

"Under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.1988) (citations omitted). For the law of the case doctrine to apply, "the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir.2000) (quoting *Liberty Mut. Ins. v. EEOC*, 691 F.2d 438, 441 (9th Cir.1982)); *United*

States v. Cote, 51 F.3d 178 (9th Cir.1995) ("[T]he law of the case acts as a bar only when the issue in question was actually considered and decided by the first court.").

The district court denied both of Defendants' motions to dismiss in one-line orders. Thus, we do not know the district court's grounds for denying the motions. Nor can we say that the district court decided any issue by implication in the first order. The district court could have denied either motion for any number of procedural or technical reasons unrelated to the substance of the motions. It is possible that the district court denied the Defendants' second motion based on the law of the case doctrine, but, it is also possible that the district court decided, in its discretion, not to apply the law of the case doctrine due to subsequent changes in the law, or that the "manifest injustice" that would result given the new party to the suit. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997). Because we cannot determine the bases for the district court's denial of the motions, the "law of the case" does not apply. Therefore, we address the appeal on the merits.

C. Eleventh Amendment Immunity and the Abstention Doctrine

The Defendants concede that suits for injunctive or declaratory relief do not violate the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The Defendants

contend, instead, that the Eleventh Amendment bars the Plaintiffs' request for monetary damages. The Plaintiffs cannot seek monetary damages against state officials in their *official* capacity. *See Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir.1997). But, the Eleventh Amendment does not bar damage suits against state officials in their *personal* capacity. *Hafer v. Melo*, 502 U.S. 21, 30, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394-95 (9th Cir.1997).

The Plaintiffs allege the Defendants acted in individual and official capacities, and therefore, the Plaintiffs are suing them in both their individual and official capacities. Thus we presume the Plaintiffs are seeking monetary damages against the Defendants in their personal capacity. *See Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir.1999) (stating a strong presumption in favor of a personal capacity suit where an official capacity suit for damages would be barred). Accordingly, the Eleventh Amendment does not bar the Plaintiffs' claim for damages against the Defendants in so far as they are being sued in their individual capacities.

The Defendants also argue that they are immune because the Plaintiffs are attempting to enforce pendent state law claims in federal court. The Plaintiffs refer, in their first, second, and tenth claims for relief, to provisions in the California Constitution that parallel applicable provisions in the United States Constitution. The Plaintiffs concede that they could not prevail on a § 1983 claim based on a violation of state

law, because § 1983, by its own terms, protects only against violations of federal law. *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir.1981). Instead, the Plaintiffs cite California law only where it is legitimate to do so, *e.g.*, where there is a state-created liberty or property interest at stake. *See, e.g., Paul v. Davis*, 424 U.S. 693, 710-12, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Accordingly, the Plaintiffs' claims are not barred on this ground, and we need not consider the Defendants' arguments that the Plaintiffs' state law claims are "novel and complex" under 28 U.S.C. § 1367(c).[6]

D. Section 1983 Claims

The Defendants' first substantive argument is that the Plaintiffs have not properly pled a claim under § 1983, because they are not proper defendants for a § 1983 suit. "To sustain an action under section

---

[6] The Defendants also suggest we should "abstain" under the Abstention Doctrine. The Defendants appear to confuse abstention with denial of pendent jurisdiction under the "novel and complex" clause of 28 U.S.C. § 1367(c). If they meant abstention proper, they waived that argument by failing to raise it before the district court. *See Conn. Gen. Life Ins. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir.2003). Nor do we see any reason to abstain in this situation. *Pullman* abstention is not appropriate because the driving force behind each of the Plaintiffs' claims is a right guaranteed by the United States Constitution, and state court clarification of state law would not make a federal court ruling unnecessary. *See R.R. Comm. v. Pullman Co.*, 312 U.S. 496, 499-501, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir.1989).

All the Defendants were acting under the color of California law when they engaged in the alleged unconstitutional conduct. The Defendants argue, however, that their conduct did not deprive the Plaintiffs of constitutional or statutory rights.

A person deprives another of a constitutional right, where that person "does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [that person] is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978). Indeed, the "requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44.

In limited circumstances, a person can also be subject to § 1983 liability for the acts of others. Although there is no pure *respondeat superior* liability under § 1983, a supervisor is liable for the constitutional violations of subordinates "if the supervisor participated in or directed the violations, or knew of

the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989).

The Plaintiffs proceed on two theories: (a) that the Defendants created policies and procedures that violated the Plaintiffs' constitutional rights; and (b) that the Defendants were willfully blind to constitutional violations committed by their subordinates. Because the Defendants were directors and policymakers for Atascadero State Hospital, the Plaintiffs have sufficiently alleged that the constitutional violations they suffered were "set in motion" by the Defendants' policy decisions or, at the very least, that the Defendants knew of these abuses and demonstrated a deliberate indifference to the Plaintiffs' plight.

Under *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th Cir.1988), the Plaintiffs will need to show how the deliberate indifference or affirmative actions of each Defendant caused a constitutional violation before they can seek monetary damages against any individual Defendant. At this stage of pleading, however, the Plaintiffs' [sic] need not specifically delineate how each Defendant contributed to the violation of their constitutional rights. Indeed, we do not see how, prior to discovery, they *could* plead the individual roles of each state officer with any more specificity. Taking the statements in the complaint in the light most favorable to the Plaintiffs, the Plaintiffs may be able to state a claim against all of the named Defendants, each of whom played an instrumental role in policymaking and enforcement at Atascadero State Hospital. Therefore,

we hold the Plaintiffs have sufficiently alleged the Defendants' role in the alleged constitutional violations against SVPs to survive this motion to dismiss.

E. Qualified Immunity

The Defendants also argued that the district court erred when it denied them qualified immunity. As the Defendants have conceded, qualified immunity is only an immunity from a suit for damages, and does not provide immunity from suit for declaratory or injunctive relief. *See L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir.1993). The Defendants argue that they are entitled to qualified immunity to the extent that the Plaintiffs seek monetary damages.

In analyzing the Defendants' qualified immunity defense, we must determine: (1) what right has been violated; (2) whether that right was so "clearly established" at the time of the incident that a reasonable official would have been aware that the conduct violated constitutional bounds; and (3) whether a reasonable public official could have believed that the alleged conduct was lawful. *See Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir.1996).

To withstand the Defendants' claims of qualified immunity, the Plaintiffs must allege a violation of a right that was clearly established in 1998 – the time the alleged constitutional violations first occurred. *See Anderson*, 483 U.S. at 639-40, 107 S.Ct. 3034; *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir.2002). To

defeat qualified immunity, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

But, the Plaintiffs need not establish that the Defendants' "behavior had been previously declared unconstitutional." *Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir.1997). Rather, if binding authority indicates that "the disputed right existed, even if no case had specifically so declared," the Defendants would be on notice of the right. *Id.* at 255. If the occasion has not risen for our circuit to reach a question, we may draw clearly established law from other circuits. *See Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir.2005); *Jacobs v. City of Chicago*, 215 F.3d 758, 767 (7th Cir.2000) (finding a violation of clearly established law where there is "such a clear trend in the case law" that recognition of the right is "only a matter of time").

Before we consider the Plaintiffs' claims individually to determine whether the claims were clearly established in 1998, we address a threshold question that applies to the Plaintiffs' claims more generally. The Defendants argue, as a broad proposition, that damages are not appropriate in this suit because the law applicable to SVPs is still evolving. This suit is unique, in that it is one of the first widespread class actions to challenge the conditions of detention for civilly confined SVPs. However, the Defendants may

have transgressed some clearly established boundaries.

First, civilly detained persons must be afforded "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 322, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *see also Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir.2000). It follows logically, then, that the rights afforded prisoners set a floor for those that must be afforded SVPs, and that where the Defendants violate a standard that is clearly established in the prison context, the violation is clearly established under the SVP scheme, except where the California SVP statutory scheme would give a reasonable official reason to believe that the body of law applicable to prisoners would not apply.[7]

Second, where there is clearly established body of law that applies to all civilly committed persons, there is no reason that the law should not apply to SVPs as well. For, as we have previously held:

---

[7] Contrary to our dissenting colleague's analysis, we see this as a very minor analytical step. The State detains prisoners for the purpose of punishment. It detains SVPs for the purpose of treatment, and its treatment has no punitive element to it. It seems entirely unremarkable, then, to say that the State cannot treat SVPs *worse* than prisoners. The "only reasonable conclusion from binding authority" is that the conditions of confinement for SVPs cannot be more harsh than those under which prisoners are detained, except where the statute itself creates a relevant difference. *Blueford*, 108 F.3d at 255.

> The state cannot have it both ways. If confinement of a sexually violent predator is civil for the purposes of evaluation under the Ex Post Facto clause, that confinement is civil for the purposes of defining the rights to which the detainee is entitled while confined. Civil status means civil status, with all the . . . rights that accompany it.

Jones v. Blanas, 393 F.3d 918, 933 (9th Cir.2004).

Thus, there are two bodies of law from which we might draw "clearly established" law for qualified immunity purposes: first, where the SVPs claim a violation of a right that is clearly established even in the prison context, and second, where the SVPs claim a violation of a right that is clearly established for all civilly detained persons.

We acknowledge at the outset that it is not always clearly established *how much* more expansive the rights of civilly detained persons are than those of criminally detained persons. As discussed below, the rights afforded civilly detained persons are flexible enough to take into account the circumstances of detention. The law generally requires a careful balancing of the rights of individuals who are detained for treatment, not punishment, against the state's interests in institutional security and the safety of those housed at the facility. *See, e.g.*, *Youngberg*, 457 U.S. at 319-22, 102 S.Ct. 2452. In weighing those interests, it cannot be ignored that, unlike the plaintiff in *Youngberg* who was civilly committed because of mental infirmities, SVPs have been civilly committed

subsequent to criminal convictions and have been adjudged to pose a danger to the health and safety of others. Therefore, the rights of SVPs may not necessarily be coexistensive with those of all other civilly detained persons.[8]

With these threshold issues in mind, we review each of the Plaintiffs' claims to determine whether they have sufficiently pled a violation of clearly established rights.

1. First and Fourteenth Amendment Rights

The Plaintiffs contend that the Defendants retaliated against them for filing lawsuits regarding conditions at Atascadero State Hospital. Specifically, the Plaintiffs claim that, as a result of preparing this suit and others regarding conditions at Atascadero, they have been subjected to access-level reductions,

---

[8] We thus agree with our dissenting colleague that context is critical in constitutional claims. Nonetheless, this admission – that it is not clear how much more extensive the rights of SVPs are – does not inexorably lead to the conclusion that there can be no violation of clearly established law. It may not be clear exactly what due process rights are to be afforded SVPs, but surely it is clear that certain actions – forcing SVPs to live in squalid conditions, turning a blind eye to physical attacks against SVPs, and forcing SVPs to take medication as punishment or in retaliation for filing a lawsuit or for refusing to speak during treatment sessions – transgress the boundary. Surely it would not require "law train[ing]" or clairvoyance to recognize that these actions, as alleged by the Plaintiffs, do no comport with due process.

harassment by Atascadero personnel, and excessive room searches and seizures of property. The Plaintiffs also alleged that they have been denied library access in retaliation of their bringing suit and filing complaints.

The Fourteenth Amendment right to access the courts survives detention. *See Bounds v. Smith*, 430 U.S. 817, 821-22, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."); *Cornett v. Donovan*, 51 F.3d 894, 898 (9th Cir.1995) (holding that "right of access [to the courts] is guaranteed to people institutionalized in a state mental hospital regardless of whether they are civilly committed after criminal proceedings or civilly committed on grounds of dangerousness"). Similarly, punishment in retaliation for exercising one's right to access the courts may constitute a First Amendment violation. *See Rizzo v. Dawson*, 778 F.2d 527, 531-32 (9th Cir.1985).

We have held that the prohibition against retaliatory punishment is "'clearly established law' in the Ninth Circuit, for qualified immunity purposes." *Pratt v. Rowland*, 65 F.3d 802, 806 & n. 4 (9th Cir.1995). Given the facts alleged,[9] the Plaintiffs may

---

[9] The Plaintiffs' original pro se complaint contains particularly persuasive narratives on this issue. It details how Atascadero personnel responded when they learned of this suit, altering schedules so that the coordinators of this action would not be able to work together, telling the Plaintiffs that their

(Continued on following page)

be able to prove they were punished in retaliation for exercising their First and Fourteenth Amendment rights to file grievances about the conditions of their confinement. Accordingly, their claims should not be dismissed at the Rule 12(b)(6) stage.

The Plaintiffs also allege that the Defendants force them to participate in treatment that violates their First Amendment rights. Specifically, the Plaintiffs allege that the Defendants bar SVPs from progressing beyond Phase One and obtaining higher access levels until they sign contracts admitting that they have an illness and need treatment. The decision to sign the contract is the ultimate Catch-22: during re-commitment hearings, the contract is used against those who sign it as an admission of illness, and used against those who do not sign it as a refusal to be amenable to treatment.

The Plaintiffs also allege that SVPs who attend but do not vocally participate in group treatment sessions are found by the Defendants to be "not progressing," Accordingly, these SVPs do not advance to other phases of the program and their access levels are restricted. The Plaintiffs argue that they have a First Amendment right to refrain from saying that they have an illness and to refuse to participate in

---

meeting in the library was an "illegal assembly," limiting law library time, scheduling mandatory group sessions during the SVPs' library time, and refusing to give SVPs drafting paper because it was "only for the mental patients to draft appeals."

treatment, and that the Defendants may not punish them for exercising their rights.

There may be a First Amendment right not to participate in treatment, a right respected by the language of California's SVP Act, if not in its implementation. Specifically, the SVP Act directs:

> Amenability to treatment is not required for a finding that any person is a person described in Section 6600, nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, *nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program.*

Cal. Welf. & Inst.Code § 6606(b) (emphasis added). While it may be in the Plaintiffs' interest to participate in treatment, and the State may create incentives to encourage such participation, "[t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (Murphy, J., concurring). As is the case with prisoners, civilly committed persons retain those First Amendment rights not inherently inconsistent with the circumstances of their detention. *See Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The above statutory language strongly suggests that refusal to recognize one's "illness" or affirmatively

participate in treatment is not inherently inconsistent with the purposes for which SVPs are detained.

Granted, the Plaintiffs are not actually forced to speak, but the stakes for refusing to speak are so high that the Plaintiffs' participation in treatment is essentially compulsory. Indeed, an SVP who exercised his right not to admit his illness could be detained indefinitely. He would never advance past Phase One of the program and his refusal could be used against him at his re-commitment hearing as a sign that he was not sufficiently "rehabilitated" to re-enter society.

Several inmates who are criminally detained raised analogous arguments, on Fifth Amendment grounds, that programs that force sexual offenders to admit and discuss those offenses violate their rights against self-incrimination. In *McKune v. Lile*, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002), the Supreme Court held that a program did not violate an SPV's Fifth Amendment rights where it "did not extend his term of incarceration . . . [or] affect his eligibility for good-time credits or parole," and the only adverse consequence was that he was moved to the less desirable non-treatment area of the prison. *Id.* at 38-39, 122 S.Ct. 2017.

But *McKune* explicitly left open the question of whether a greater deprivation of liberty might run afoul of the Constitution by essentially compelling detainees to incriminate themselves. At least one court, reading *McKune*, allowed an inmate to proceed past pre-trial motions on First Amendment grounds

where the right to parole was conditioned on participation in treatment. *See Wolfe v. Penn. Dep't of Corr.*, 334 F.Supp.2d 762, 770-73 (E.D.Pa.2004). Similarly, in this case, where the stakes for participation in treatment are so high, the deprivations involved in refusing to participate in treatment may rise to the level of compulsion that violates the First Amendment.

The question at this stage, however, is not whether the right exists, but whether such a right is clearly established under the First Amendment. Given the volatility of the law on this point, we cannot say that it is. The challenged programs are facially related to the purposes for which SVPs are detained, and while SVPs may have a right to refuse to participate in such treatment, it is not yet clear the extent to which the State can condition privileges or advancement on participation in such treatment. As such, these claims may be more appropriately considered for declaratory or injunctive relief.

Thus, we hold that the Plaintiffs' First Amendment claims were based on clearly established law insofar as they challenge retaliation for filing lawsuits. To the extent that the claim relies on a First Amendment right not to participate in treatment sessions, the Defendants have qualified immunity, because the law on this point is not clearly established.

2. Fourth Amendment Rights

The Plaintiffs allege that Defendants' policies and practices subject Plaintiffs to unreasonable searches, seizures, and unnecessary use of force. According to the Plaintiffs, they are subjected to public strip searches, retaliatory searches of their possessions, and arbitrary seizures of their personal belongings upon arrival at Atascadero. SVPs are also shackled during transport to Atascadero and during visits with family and friends. When they refuse to participate in treatment, SVPs are subjected to "red light alarms" even when they do not pose any physical risk.[10] Moreover, SVPs are force-medicated as a means of intimidation and punishment, and for the convenience of staff.

Accepting these allegations as true, the Plaintiffs may be able to state a "clearly established" violation of their Fourth Amendment rights, and thus, the claims are not appropriate for dismissal at the Rule 12(b)(6) stage. The watchword of the Fourth Amendment in every context is "reasonableness." As this court held in *Thompson v. Souza*, 111 F.3d 694 (9th Cir.1997), "the Fourth Amendment right to be secure against unreasonable searches and seizures 'extends to incarcerated prisoners.'" *Id.* at 699 (quoting *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th

---

[10] As explained in the complaint, a "red light alarm" is when ten to twenty staff members surround and restrain the patient.

Cir.1988)). Thus, this protection certainly extends to SVPs.

Of course, "the reasonableness of a particular search [or seizure] is determined by reference to the [detention] context." *Michenfelder*, 860 F.2d at 332. There are concerns that mirror those that arise in the prison context: *e.g.*, "the safety and security of guards and others in the facility, order within the facility and the efficiency of the facility's operations." *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir.2001). But even so, qualified immunity does not protect a search or seizure that is arbitrary, retaliatory, or clearly exceeds the legitimate purpose of detention.

Under this framework, we cannot dismiss the Plaintiffs' claims. The "reasonableness" of a search or seizures is a fact-intensive inquiry that cannot be determined at this stage. *See*, *e.g.*, *Thompson*, 111 F.3d 694 (9th Cir.1997). It is impossible to make such a fact-specific determination when the precise circumstances of the searches or seizures are not before the court and when the Defendants have not yet had a chance to justify the alleged searches or seizures. We cannot say, then, that the Plaintiffs cannot possibly state a "clearly established violation" based on any facts consistent with their pleadings.[11] Therefore,

---

[11] The excessive force claims under the Fourth and Fourteenth Amendment – *e.g.*, forced medication, excessive use of red light alarms, and use of shackles – largely duplicate the Plaintiffs' excessive force claims under the Eighth and Fourteenth

(Continued on following page)

Defendants do not have a right to dismissal under Rule 12(b)(6) based on qualified immunity.

3. Double Jeopardy and Ex Post Facto Clauses

The Plaintiffs allege violations of the Double Jeopardy and Ex Post Facto clauses. While the Plaintiffs concede that these two clauses have punishment as an essential prerequisite and that the SVP Act is a civil detention statute, they claim that the SVP Act is punitive *as applied to them*. As such, the Plaintiffs argue that their Double Jeopardy and Ex Post Facto claims are not barred.

In upholding a law similar to California's SVP Act, the Supreme Court held that "[a]n Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto clauses and provide cause for release." *Seling v. Young*, 531 U.S. 250, 267, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001). Similarly, the California Supreme Court stressed the civil nature of a sexually violent predator commitment and rejected challenges to California's SVP Act based on the Ex Post Facto and Double Jeopardy Clauses of the federal constitution. *See Hubbart v. Super. Ct.*, 19 Cal.4th 1138, 1171, 81 Cal.Rptr.2d 492, 969 P.2d 584 (1999). The Plaintiffs' claims based on the Double Jeopardy and Ex

---

Amendments, and their claims for Substantive Due Process. We consider all these claims together below.

Post Facto clauses of the federal constitution are foreclosed.[12]

The Plaintiffs argue that *Seling* does not control because they are not "seeking release" as was the habeas petitioner in *Seling*. This is a distinction without a difference. The court in *Seling* made it abundantly clear that the civil nature of the SVP scheme "cannot be altered based merely on the vagaries in implementation of the authorizing statute." *Id.* at 263, 121 S.Ct. 727. Accordingly, we hold that the civil nature of California's SVP Act is not altered because of the remedy sought and we reverse the district court's order denying Defendants' motion to dismiss the claims related to the Ex Post Facto and Double Jeopardy Clauses.

4. Eighth and Fourteenth Amendment Claims

The Plaintiffs allege in their complaint that the "restrictive and denigrating conditions" at the Atascadero State Hospital constitute cruel and unusual

---

[12] *Seling* did not, however, alter our authority to consider implementation of the SVP Act on the Plaintiffs' other claims. *See Seling*, 531 U.S. at 266, 121 S.Ct. 727 ("This case gives us no occasion to consider how the civil nature of a confinement scheme relates to other constitutional challenges, such as due process, or to consider the extent to which a court may look to actual conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil in nature.").

punishment in violation of the Eighth Amendment. The Eighth Amendment has, as an essential prerequisite, the right to punish. *See DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199 n. 6, 109 S.Ct. 998, 103 L.Ed.2d 249 ("The State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."). Here, SVPs are detained for the purpose of treatment, and the state's power to punish them expires at the end of their sentence. Accordingly, the Eighth Amendment is not the proper vehicle to challenge the conditions of civil commitment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

The thrust of the Plaintiffs' claim here is that because the conditions of confinement amount to punishment, they should be permitted to argue that this "punishment" is cruel and unusual. Once again, this "punitive as applied" argument is foreclosed by *Seling*. Therefore, we hold that the district court erred when it failed to dismiss the Eighth Amendment claim against the Defendants.

Of course, this is a small victory for the Defendants, because the same claims for inhumane treatment and failure to protect may be raised under the Fourteenth Amendment. The standard applicable to SVPs under the Fourteenth Amendment is at least coextensive with that applicable to prisoners under the Eighth Amendment. *See, e.g., Munoz v. Kolender*, 208 F.Supp.2d 1125, 1146 (S.D.Cal.2002) (applying

Fourteenth Amendment standards to SVPs because "comparable standards apply to both prisoners' Eighth Amendment cruel and unusual punishment and Fourteenth Amendment substantive due process analyses, with Fourteenth Amendment analysis borrowing from Eighth Amendment standards"); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir.1998) (applying Eighth Amendment standards to evaluate pretrial detainees' Fourteenth Amendment claims). Moreover, the Eighth Amendment provides too *little* protection for those whom the state cannot punish. *See Jones*, 393 F.3d at 931-34; *Andrews*, 253 F.3d at 1061. Plaintiffs apparently recognize this, because their Eighth Amendment claims largely duplicate those raised under the substantive due process clause of the Fourteenth Amendment. Accordingly, we consider the Plaintiffs' allegations that the Defendants actions violate their due process rights under the Fourteenth Amendment.

5. Fourteenth Amendment Procedural Due Process Claims

The Plaintiffs allege a number of procedural due process violations. They allege that Defendants force them to participate in the five-phase treatment program at Atascadero, and based on their progression through that treatment program, subject them to privilege reductions, access level reductions, and reclassifications, and force them to take medication in non-emergency situations. The Plaintiffs allege that these deprivations occur without adequate notice of,

or opportunity to respond to, accusations of alleged sanctionable conduct. The Plaintiffs cite caselaw applicable to prisoners and argue that the procedural protections afforded to prisoners in this context should be afforded them as well.

The Plaintiffs have not adequately pled the loss of clearly established due process rights. The Supreme Court has explained that due process claims by prisoners depend in large part on whether the prisoners have some "justifiable expectation rooted in state law." *Montanye v. Haymes*, 427 U.S. 236, 242, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976); *see also Washington v. Harper*, 494 U.S. 210, 220, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). SVPs differ from prisoners in at least one important respect: an individual who has been designated an SVP has been found, under California law, to have "a diagnosed mental disorder that makes the person a danger to the health and safety of others." Cal. Welf. & Inst.Code § 6600(a)(1). Once a jury designates someone an SVP, California law *requires* that the SVP be provided "treatment for his or her diagnosed mental disorder." *Id.* § 6606(a). Moreover, the SVP commitment statute gives the Department of Mental Health Services the authority to forcibly medicate an SVP for purposes of treatment. *Id.* § 6606(b).[13]

---

[13] The Plaintiffs do not challenge California's SVP Act.

The five-phase treatment program at Atascadero must be "consistent with current institutional standards for the treatment of sex offenders, and . . . based on a structured treatment protocol developed by the State Department of Mental Health." *Id.* § 6606(c). Its purpose, and the purpose of the attendant changes in privileges, access level, and classification under its protocols, is not punishment, but treatment in preparation for the SVP's eventual release.

Accordingly, the Plaintiffs cannot have an expectation to be free of such treatment under state SVP law. The complained-of actions are, at least facially, part of the treatment plan Atascadero is legally required to provide to persons that the state has deemed mentally ill. Given this relevant difference between SVPs and prisoners, we cannot say that the procedural protections provided to prisoners as they relate to forced medication and forced treatment clearly apply to SVPs.

Moreover, there are numerous procedural safeguards afforded to an individual facing an action for civil commitment. Proceedings to designate a person an SVP are initiated only after a finding by two practicing psychologists or psychiatrists that the individual has a "mental disorder" such that he is likely to re-offend unless he receives "appropriate treatment and custody." *See id.* § 6601(d)-(f). Persons in SVP proceedings have the right to counsel, the right to consult experts, the right to have the state prove their SVP status beyond a reasonable doubt,

and the right to a unanimous jury verdict. *See id.* §§ 6603-04.

In addition, after initial designation, an SVP is given periodic opportunities to challenge his continued need for treatment. *See id.* §§ 6605, 6608. Thus, SVPs are not subjected to Atascadero's treatment program without certain procedural protections, nor are they relegated to indefinite treatment without the ability to seek judicial intervention.

The Plaintiffs may have liberty interests akin to those possessed by prisoners in this context, and thus may have the right to further procedural protections within the walls of Atascadero. But such rights are not yet clearly established. Because the Plaintiffs have been designated as mentally ill and in need of treatment, a reasonable state official would have reason to believe that the law applicable to the treatment and medication of prisoners did not apply to SVPs. We therefore hold that Defendants are entitled to qualified immunity in regards to Plaintiffs' procedural due process claims. Accordingly, we reverse the district court's holding as to the Plaintiffs' sixth cause of action.

6. Fourteenth Amendment Substantive Due Process Claims

The Plaintiffs contend that the Defendants have violated their substantive due process rights by failing to protect them from the abuse of other detainees and employees. The Plaintiffs' claims can be

broken down into three general categories: (a) claims that the Defendants failed to protect the Plaintiffs from the abuses of other persons detained at Atascadero; (b) claims that the Defendants failed to provide constitutionally adequate conditions of detention; and (c) claims that the Defendants use excessive force against them.[14]

First, the Plaintiffs claim that the Defendants have turned a blind eye to the conduct of other persons detained at Atascadero State Hospital. Specifically, the Plaintiffs allege that they are intentionally exposed to feces, urine, vomit, spit, and blood in Atascadero's courtyards, bathrooms, hallways, dining rooms, and gymnasium, and that other detainees contaminate their food with spit and other unsanitary taint. The Plaintiffs allege that they are subjected to verbal harassment, physical abuse, and sexual assaults by other patients at the Hospital. They contend that they are targeted because they are sex offenders.

The patient population at Atascadero State Hospital comprises males who are civilly and penally committed. The individuals committed at the Hospital are confined under a variety of statutes. *See* Cal.Penal Code § 1026 (covering patients "not guilty by reason of insanity"); Cal.Penal Code § 1370 (covering patients "incompetent to stand trial"); Cal.Penal

---

[14] Here, we consider the Plaintiffs' substantive due process allegations from their Second, Fifth, and Seventh causes of action.

Code §§ 2962, 2964 (covering "mentally disordered offenders" serving their parole time); Cal. Welf. & Inst.Code § 6316 (covering "mentally disordered sex offenders"); Cal.Penal Code § 2684 (covering mentally ill prisoners transferred to Atascadero State Hospital for psychiatric stabilization). According to the Plaintiffs, their forced integration as openly labeled "sexually violent predators" subjects them to verbal harassment, physical abuse, and sexual assaults from the rest of the Atascadero population.

The Plaintiffs' right to be protected and confined in a safe institution are clearly established. *See Youngberg*, 457 U.S. at 319-22, 102 S.Ct. 2452 (stating that individuals who are involuntarily civilly committed have constitutionally protected rights under the due process clause to reasonably safe conditions of confinement and freedom from unreasonable bodily restraints). The right is clearly established for civilly committed persons and prisoners alike. *See Farmer v. Brennan*, 511 U.S. 825, 833, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Neely v. Feinstein*, 50 F.3d 1502, 1508 (9th Cir.1995) (finding "clearly established" that patients have a "constitutional right to be safe in the state institutions to which they are committed"). Assuming the Plaintiffs can prove the allegations in their complaint and the Defendants' blindness to such conditions in Atascadero, qualified immunity would not be appropriate on these claims.

Second, the Plaintiffs allege that the conditions of confinement are constitutionally inadequate – that they are forced to live in squalid conditions that are

inhumane and pose a serious health risk. The Plaintiffs have a clearly established right not to be exposed to such unsanitary conditions. *See Anderson v. County of Kern*, 45 F.3d 1310, 1314-15 (9th Cir.1995) (collecting cases in prison context); *Youngberg*, 457 U.S. at 315-16, 102 S.Ct. 2452 (establishing a right to "personal security" for involuntarily committed persons).[15] Given the Plaintiffs' allegations, their claims as to the unsanitary and unsafe conditions of confinement cannot be dismissed under Rule 12(b)(6).

The Plaintiffs also allege several claims of excessive force, *e.g.*, (a) that "red light alarms" are used when the Plaintiffs refuse to participate in treatment, even when persons pose no threat of physical violence; (b) that shackles are used during transportation and during visits with family and friends; and, more generally, (c) that Plaintiffs are subjected to "excessive punishment . . . [and] excessive use of force and physical restraints." It is well-established that detained persons have a right to be free from excessive force. While excessive force claims by prisoners are reviewed under the Eighth Amendment's malicious and sadistic standard, *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), the

---

[15] In the prison context, claims of unsanitary conditions are evaluated under the Eighth Amendment. *See Anderson*, 45 F.3d at 1314. Although the Eighth Amendment does not apply here, similar standards may apply to SVPs under the Fourteenth Amendment. *See Munoz v. Kolender*, 208 F.Supp.2d 1125, 1146 (S.D.Cal.2002)

more generous Fourteenth Amendment standard applies to those who are civilly confined. As we previously stated:

> If confinement of a sexually violent predator is civil for the purposes of evaluation under the Ex Post Facto clause, that confinement is civil for the purposes of defining the rights to which the detainee is entitled while confined [in a treatment facility]. Civil status means civil status, with all the Fourteenth Amendment rights that accompany it.

Jones, 393 F.3d at 933.

The Fourteenth Amendment requires that civilly committed persons not be subjected to conditions that amount to punishment, *Bell*, 441 U.S. at 536, 99 S.Ct. 1861, within the bounds of professional discretion, *Youngberg*, 457 U.S. at 321-22, 102 S.Ct. 2452. Moreover, "due process requires that the conditions and duration of confinement [for civilly confined persons] bear some reasonable relation to the purpose for which persons are committed." *Seling*, 531 U.S. at 265, 121 S.Ct. 727; *see also Jones*, 393 F.3d at 931. While the nature of an SVP's confinement may factor in this balance of what is reasonable, it is clearly established that the substantive due process protections of the Fourteenth Amendment apply to SVPs. *See Andrews*, 253 F.3d at 1061 (applying the Fourteenth Amendment's "objective reasonableness"

standard to excessive force claims brought by civilly committed SVPs).[16]

We also reiterate that SVPs must, at a minimum, be afforded the rights afforded prisoners confined in a penal institution. Thus, the Eighth Amendment still provides a floor for the level of protection that SVPs must receive under the Fourteenth Amendment, and because the contours of the Eighth Amendment are more defined, Eighth Amendment jurisprudence may provide helpful guidance as to the standards to be applied. Under the Eighth Amendment, the unnecessary and wanton force standard takes into account such facts as the need for the application of force, the relationship between the need and the amount of force used, the threat perceived by the officer, any effort to temper the severity of the forceful response, and the extent of the injury inflicted, and whether the force was applied for a legitimate purpose. *See Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). If plaintiffs allege conduct that sinks below protections afforded prisoners under the Eighth Amendment, their claim certainly states a

---

[16] While *Jones*, *Neer*, and *Seling* are more recent cases, they do little more than restate the contours of law clearly established in *Youngberg*, a 1982 case, and *Bell*, a 1979 case. *Seling* essentially restates the *Youngberg* test, and *Jones* does little more than connect the line between *Youngberg* and SVPs based on California's argument that the statute should be construed as a civil confinement statute. We believe a reasonable official reading *Youngberg* would have sufficient notice that they would be held to *Youngberg*'s standards of due process.

violation of their rights under the Fourteenth Amendment.

The Plaintiffs allege that force is used in retaliation for exercising legitimate rights and that the amount of force used is often a gross overreaction to the situation. Such use of force, if proved, is not reasonable and failure to curtail such abuses cannot be said to be within the Defendants' professional discretion. Therefore, we affirm the district court's denial of the motion to dismiss on these grounds.

On each of these three grounds – failure to protect, inadequate conditions of confinement, and excessive force – the Plaintiffs may be able to state a "clearly established" Fourteenth Amendment Substantive Due Process violation, and we cannot, at the Rule 12(b)(6) stage, dismiss these substantive due process claims.

7. Fourteenth Amendment Equal Protection Claims

According to the Plaintiffs, they are being treated more restrictively than other civilly committed patients. They allege that their conditions are more punitive than those under which all other civilly committed persons are held. For one example, they allege that other civilly-committed persons are given priority in hiring for remunerative positions.

Even though the Plaintiffs do not constitute a suspect class, heightened scrutiny may be required

where fundamental interests are at issue. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). This court upheld application of a "heightened scrutiny standard" when evaluating an equal protection violation under Washington State's Sexually Violent Predator Statute. *See Young v. Weston*, 176 F.3d 1196, 1201 (9th Cir.1999), *rev'd on other grounds*, *Seling*, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734. While *Young* was decided in 1999, it rested on a firmly established principle in existence at the time of events in question: that heightened scrutiny will be applied where a fundamental liberty interest is at stake. *See Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). The Plaintiffs may be able to claim violations of several clearly established fundamental rights: a liberty interest in freedom from bodily restraint and personal security, *Youngberg*, 457 U.S. at 315-316, 102 S.Ct. 2452, and a fundamental right to access the courts, as described below. Accordingly, heightened scrutiny is the standard for equal protection claims implicating these fundamental rights. And the Plaintiffs, in line with their allegations, may be able to show that the differential treatment between themselves and other civilly committed persons violates equal protection because such treatment does not meet heightened scrutiny.

At the same time, we cannot say that it is firmly established that *every* condition of an SVP's confinement is subject to heightened scrutiny. In the prison setting, we have made clear that prison officials need latitude in deciding how to run prisons, and we have refused to subject each classification drawn by prison officials to heightened scrutiny. Rather, a prisoner cannot challenge the conditions of his confinement on equal protection grounds unless the discrimination against him is irrational or arbitrary. *See McGinnis v. Royster*, 410 U.S. 263, 276, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973). That is, in so far as the Plaintiffs' claims rely on classifications not related to fundamental liberty interests, the Defendants will have qualified immunity unless there is no rational basis for the classification.

Even under the rational basis standard, we cannot dismiss the Plaintiffs' equal protection claims at this stage. The Plaintiffs' pleadings raise several questionable classifications. For example, it seems arbitrary that SVPs should be treated more harshly than other civilly committed persons in job placement and privileges. Based on the pleadings, the Plaintiffs may be able to prove a violation of clearly established law congruent with the facts alleged. Admittedly, at this stage, the Defendants have not fully developed and presented the rationale for their actions and there may be differences between SVPs and other civilly committed persons that warrant differential treatment. But we leave it to the district court, on a

fuller factual record, to consider whether the classifications are irrational and arbitrary.

8. Sixth Amendment Right to Counsel and Fourteenth Amendment Right of Access to Courts

The Plaintiffs claim that they cannot privately correspond with counsel, have telephone conversations with counsel, and are otherwise hindered in their ability to prepare for their probable cause and commitment hearings.

Plaintiffs have a statutory right to counsel in probable cause proceedings and in commitment hearings. Cal. Welf. & Inst.Code §§ 6602, 6603, 6605(d). To protect the right to counsel, "a [detainee] must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 10, 75 S.Ct. 1, 99 L.Ed. 4 (1954). While the Sixth Amendment, by its express language, protects those in *criminal* proceedings, the Fourteenth Amendment protects all detainees against governmental interference in their right of access to courts. *See Procunier v. Martinez*, 416 U.S. 396, 419-20, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (overruled on other grounds); *Cornett v. Donovan*, 51 F.3d 894, 897 & n. 4 (9th Cir.1995). The right of access to courts has been found to encompass the right to talk in person and on the telephone with counsel in confidential settings, *Procunier*, 416 U.S. at 419, 94 S.Ct. 1800;

Ching v. Lewis, 895 F.2d 608, 609 (9th Cir.1990), and to use available law library resources, *Keenan v. Hall*, 83 F.3d 1083 (1996), subject to legitimate restrictions related to the purpose and circumstances of detention, *see Turner*, 482 U.S. at 89, 107 S.Ct. 2254. Where such rights have been upheld in the prison context, SVPs must be afforded rights at least as broad.

Such a fact specific inquiry can hardly be undertaken at this point, when it is not clear what the Defendants have done to impede access to the courts, or why they have done so, or how the Defendants' actions have affected the Plaintiffs' right of access. Nonetheless, the Plaintiffs may be able to state a violation of clearly established law congruent with their allegations, and we affirm the district court's order denying Defendants' Rule 12(b)(6) motion to dismiss as to Plaintiffs' Tenth claim based on access to courts.

9. Right to Privacy under the Fourteenth Amendment

The Plaintiffs allege that the Defendants' policies do not allow for privacy when showering, sleeping, using the toilets, or participating in therapy sessions. It is clearly established that the Fourteenth Amendment protects a sphere of privacy, and the most "basic subject of privacy . . . the naked body." *Grummett v. Rushen*, 779 F.2d 491, 494 (9th Cir.1985). While the circumstances of institutional life demand that

privacy be limited, it is clearly established that gratuitous invasions of privacy violate the Fourteenth Amendment. *See id.* Again, this calls for a highly factual inquiry where the facts are not fully developed. In *Grummett*, for example, we considered the gender of those prison officials who viewed inmates, the angle and duration of viewing, and the steps the prison had taken to minimize invasions of privacy. *See id.* at 494-95. Such facts are simply not available to us at this stage of proceedings.[17] Nonetheless, the Plaintiffs may be able to state a violation of clearly established law congruent with their allegations, and as such we will not dismiss their claim under Rule 12(b)(6).

* * *

In sum, we affirm the district court's decision to deny qualified immunity on the Plaintiffs' first, second, seventh, eighth, ninth, and tenth causes of action to the extent noted above. We reverse in part and hold that the Defendants have qualified immunity from suit on the Plaintiffs' Ex Post Facto, Double Jeopardy, Procedural Due Process, and Eighth Amendment claims.

---

[17] Moreover, we note that it is not, as the Defendants hinted in their briefs, the burden of the SVPs to show that there is no compelling justification for the regulations, but rather the burden of the State to show that there is such a justification. *See Walker v. Sumner*, 917 F.2d 382, 385-87 (9th Cir.1990).

F. The Defendants' Belief That Their Conduct Was Lawful Was Not Objectively Reasonable

Even if the Plaintiffs have alleged violations of a clearly established right, a government official is entitled to qualified immunity if he or she "could . . . have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right." *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir.2001); *see also Alford v. Haner*, 333 F.3d 972, 977 (9th Cir.2003). This is a limited exception, however: if the law is clearly established, the immunity defense "ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Whether the Defendants' conduct was reasonable involves a factual analysis of the circumstances surrounding Defendants' actions and a determination of whether a reasonable official similarly situated would have been aware that his/her actions violated the law, an inquiry difficult to conduct at this stage. Based on the facts in front of us, however, we do not believe Defendants can claim that their conduct was objectively reasonable. The Defendants argue that the volatile nature of the law surrounding SVPs entitles them to escape liability entirely. We do not adhere to the theory that "every dog is entitled to one bite." The Defendants could not have been so completely unaware of the standards that would apply to

their conduct as it related to SVPs. As explained above, SVPs are not entirely dissimilar from other groups of civilly committed persons. Moreover, the Plaintiffs' complaint alleges practices that would be unconstitutional if directed at any prisoner. Accordingly, Defendants cannot escape liability based on a "reasonable but mistaken" belief about the constitutionality of their conduct.

CONCLUSION

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part the district court's order denying the Defendants' second motion to dismiss under Rule 12(b)(6). Each side to bear its own costs.

TROTT, Circuit Judge, concurring in part and dissenting in part:

I

My disagreement with my colleagues is limited to one critical issue. We agree that plaintiffs cannot seek damages in this lawsuit against state officials in their *official* capacities, and that plaintiffs cannot seek damages from the State either. So, what is left where the officials are concerned? A lawsuit against them personally for acts and omissions alleged to have been taken in the discharge of their official duties. It is here that I part company.

The issues raised by these plaintiffs are certainly important and require our attention, but the issues can be thoroughly litigated and authoritatively decided *without* involving the state officials as individuals. Requiring these individuals to participate in their individual capacities not only is unnecessary, but to render them personally liable for damages contravenes the very purpose of the doctrine of qualified immunity as explained by the Supreme Court:

> [P]ermitting damages suits against government officials can entail substantive social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.

Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, the Court has held that officials are immune unless "the law clearly proscribed the actions" they took, *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); and that the unlawfulness must be apparent in the light of preexisting law. *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

On this record, and under these circumstances, I conclude, with all respect to my colleagues, that these officials as individuals are entitled to qualified immunity against both suit and damages – now, not later. In my view, the particulars and the contours of the alleged constitutional rights upon which the plaintiffs rely were not so clearly established at the

times under scrutiny and at the level of specificity required such that a reasonable official hired by the state to cope pursuant to statutory authority with lawfully confined sexually violent predators subject to remedial treatment would have been aware that the conduct alleged violated federal constitutional bounds. Given the unsettled nature of the law in this area, a reasonable official could certainly have believed otherwise.

We decide this appeal with clear analytical guidance from the Supreme Court:

> Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.
>
> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied

> at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. *Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.* Harlow *would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."* It should not be surprising, therefore, that our cases establish that *the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense*: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, *but it is to say that in the light of pre-existing law the unlawfulness must be apparent.*

Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (emphasis added) (alteration in original) (internal citations omitted).

As my colleagues acknowledge, "this suit is unique, in that it is one of the first widespread class actions to challenge the conditions of detention for civilly confined SVPs." It is not only unique, but it requires us to answer questions never before squarely addressed in this context. This factor alone should be enough to entitle these individual defendants to dismissal.

My colleagues rely on *Youngberg v. Romeo*, 457 U.S. 307, 322, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) for the proposition that "civilly detained persons must be afforded 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'" This is an unremarkable quote used out of context, but it gets us nowhere in pursuit of an answer to the central question of whether we have *in this lawsuit* violations of clearly established rights. Why? Because *Youngberg* dealt with the passive confinement for their own good of mentally defective persons. In contrast, and as recently recognized by the Supreme Court, sexually violent predators are confined in order to protect "the public from dangerous individuals with treatable as well as untreatable conditions." *Seling v. Young*, 531 U.S. 250, 262, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001). In addition, the *Seling* Court said that the case before it for decision "gives us no occasion to consider how the civil nature of a confinement scheme relates to other constitutional challenges, such as due process. . . ." *Id.* at 266, 121 S.Ct. 727. It is little wonder, therefore, that my colleagues admit in connection

with *Youngberg* that "it is not always clearly established *how much more expansive* the right of civilly detained persons are than those of criminally detained persons." I disagree with my colleagues' claim that "[i]t follows logically [from *Youngberg*], then, that the *rights afforded prisoners* set a floor for those [rights] that must be afforded SVPs, and that where Defendants violate a standard that is clearly established *in the prison context*, the violation is clearly established under the SVP scheme[.]" Certainly this "logic" based assertion is not a proposition clearly established and controlling at the time relevant to this lawsuit. Saying that rights follow logically from one area to another is an admission that those rights have not yet been clearly established in the area to which they are being transported. Prisoners have constitutional rights flowing from certain constitutional guarantees that do *not* apply out of the criminal context. Which clearly established "prisoner rights" are they talking about? I cannot find my colleagues' bold assertion anywhere in any case before this one. Where is the required level of specificity required to hold these *individuals* personally responsible for their acts? It is nowhere to be found. Where is the fair warning to them as to the constitutional limits of their compulsory treatment programs? Expanding and extending some rights from other contexts and extrapolating others defies the salutary purpose of the doctrine of qualified immunity.

My colleagues concede that the defendants are entitled to qualified immunity with respect to the

plaintiffs' procedural due process claims under the Fourteenth Amendment. Why? Because these plaintiffs are markedly different than prisoners. The plaintiffs are subject to a program mandated by state law requiring that they be treated for their diagnosed mental disorders, treatment which includes forcible medication and is subject to "numerous procedural safeguards." The critical distinction recognized by my colleagues – in my view – should carry over to *all* claims made by these plaintiffs, not just the claim to which it is selectively applied.

I find more than significant the relative newness of the civil commitment procedure at issue in this case. California's Sexually Violent Predator Act was enacted in 1995. The constitutionality of this concept was not upheld until 1997, *see Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); and California's own courts did not begin definitively to iron out controversial statutory issues of treatment – such as involuntary medication without a separate court order – until 2004. *See In re Calhoun*, 121 Cal.App.4th 1315, 18 Cal.Rptr.3d 315 (2004). When did the acts complained of here occur? 1998, in the midst of grappling by appellate courts with this new modality and two years before *Seling*. In fact, the courts have yet to clarify if and how the Constitution protects sexually violent predators from various confinement and treatment modalities. Context is critical to the determination of whether a constitutional right has been established. The Supreme Court confirmed this principle in *Washington v. Harper*, 494

U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), a lawsuit filed by a mentally ill state prisoner complaining against treatment with anti-psychotic drugs against his will and without a judicial hearing. In holding that such treatment did not violate either substantive or procedural due process, the Court said, "The extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.* at 222, 110 S.Ct. 1028.

We read the same message in *Parham v. J.R.*, 442 U.S. 584, 608, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979): "What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made." *See also Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

Noteworthy in *Washington v. Harper* was a correct holding by the Washington Supreme Court that the individual defendants were entitled to qualified immunity. 494 U.S. at 218 n. 5, 110 S.Ct. 1028. The case was allowed to proceed, but *only* to consider claims for injunctive and declaratory relief under § 1983 as well as state law – which is precisely what should happen here. It seems that we are now requiring doctors and other staff to consult not just with lawyers before they devise a procedure or treatment for a sexually violent predator, but with the courts.

The Supreme Court warned against this result in *Parham*, saying, "Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer. Surely, this is the case as to medical decisions, for neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments. . . . The mode and procedure of medical diagnostic procedures is not the business of judges." 442 U.S. at 607-08, 99 S.Ct. 2493 (internal citations and quotations omitted).

The penalty for not anticipating a court ruling will be individual liability. This unfortunate situation is precisely what the doctrine of qualified immunity is designed to avoid.

II

It would appear that my colleagues' approach to this case is at irreconcilable odds with cases from at least four other Circuits, the First, Fourth, Sixth, and Eleventh.

In *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701 (1st Cir.1993), a panel including Stephen Breyer, now Justice Breyer, observed that claims against government officials for money damages cannot proceed unless predicated upon "clearly established" statutory or constitutional rights of which a reasonable person would have been aware. *Id.* at 704. In affirming a grant of summary judgment against the plaintiffs on the ground that the law relied upon by

them was not yet settled at the time of the actions in question, the Court observed that "[t]he determination is time-critical." *Id.* In other words, no individual can be held personally liable for violating a law that has not yet become particularized, which means fixed in connection with a precise context. First the clearly established law, then – and only then – potential personal monetary liability for public officials. Due process alone would seem to require such a sequence. As the Sixth Circuit explained in *McCloud v. Testa*, 97 F.3d 1536, 1541 (6th Cir.1996),

> The ultimate burden of proof in this suit is on the plaintiffs, who must establish that Testa's conduct [as a public official] violated a federal right so clearly established that any official in his position would have understood that he was under an affirmative duty to refrain from such conduct.

The court went on to indicate that "individual capacity defendants in § 1983 cases receive some benefit from legal doubt about the clarity of existing law." *Id.* at 1542. The Eleventh Circuit would agree with this proposition, remarking that "'[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.'" *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir.1997) (quoting *Kelly v. Curtis*, 21 F.3d 1544, 1550 (11th Cir.1994)) (alteration in original). Relying on one of our cases, *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir.1989), the Fourth Circuit remarked that public officials "'are not required to predict the future

course of constitutional law'"; and that "[r]arely will a state official who simply enforces a presumptively valid state statute lose her immunity from suit." *Swanson v. Powers*, 937 F.2d 965, 968, 969 (4th Cir.1991). The court concluded with this wise statement:

> The ills that would result from allowing suits for damages against state officials who simply perform their official duties are evident. Suits such as these have the potential to threaten the foundations of our most basic governmental functions – in this case, the collection of the revenue. Because the plaintiffs' asserted rights were not clearly established and because Secretary Powers acted reasonably in enforcing presumptively valid state statutes, we hold that she is entitled to immunity from suit. The judgment of the district court is therefore reversed.

Id. at 973.

In so far as my colleagues insist on borrowing principles from other contexts, they part company with the Sixth Circuit, which has held:

> We may not impose personal liability upon state social workers because they failed to anticipate that principles of law *developed in other distinct contexts* would be applied to them, for to do so would be contrary to the admonition in *Anderson v. Creighton*, 107 S.Ct. at 3039, that we should not allow plaintiffs to convert "the rule of qualified immunity into a rule of virtually unqualified

> liability simply by alleging violation of extremely abstract rights."

Eugene D. v. Karman, 889 F.2d 701, 711 (6th Cir.1989) (emphasis added). *See also Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir.1992) (Edmonson, J., dissenting) (public officials not obligated to draw analogies from other cases), *rev'd en banc*, 998 F.2d 923, 923 (11th Cir.1993) (per curiam) (adopting the reasoning of Judge Edmondson's dissent and reversing district court's denial of summary judgment to public official).

III

I take issue also with my colleagues' assertion that because the facts are not yet developed, it is too early in this lawsuit to dismiss because of qualified immunity. This claim misses the mark. As held repeatedly by the Supreme Court, qualified immunity is immunity from being sued, not just from damages. This principle explains (1) why the Court warned in *Anderson* against non-specific pleadings that allege violations of "extremely abstract rights," 483 U.S. at 639, 107 S.Ct. 3034; and (2) the Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) that "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." The Court revisited this issue again in *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133

L.Ed.2d 773 (1996). In the course of overruling a mistaken opinion by the First Circuit, the Court said,

> The source of the First Circuit's confusion was its mistaken conception of the scope of protection afforded by qualified immunity. *Harlow* and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid "standing trial," but also to avoid the burdens of "such *pretrial* matters as discovery . . . , as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'"

Id. at 308, 116 S.Ct. 834 (quoting *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982))) (alterations in original). The Court, in reversing us in 1991 on this very issue, said, "[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). *See also Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) ("[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery."); *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 526 (9th Cir.1992) (discovery should not be allowed until immunity has been decided).

Finally, my colleagues express their intention "not to eviscerate the notice pleading standard" that our system generally uses to commence a lawsuit.

I do not believe this caution is well suited to this context. Again, I reiterate that the question of qualified immunity requires prompt resolution. *Anderson* seems to require pleadings more specific than the usual "notice" standard. At the very least, pleadings against state officials in their individual capacities must demonstrate an alleged violation of a particularized and relevant constitutional right which has been clearly established. *Hunter v. Bryant* also would seem to so require. To hold otherwise is to disserve a doctrine that calls for resolution of the issue at the "earliest possible stage" in litigation. *Hunter*, 502 U.S. at 227, 112 S.Ct. 534. As Justice Kennedy said in *Siegert v. Gilley*,

> [t]he heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (Kennedy, J., concurring). *See also Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir.1995) ("When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail. . . . There is

a powerful argument that the substantive right of qualified immunity supplants the Federal Rules's scheme of pleading by short and plain statement."); *Butler v. San Diego Dist. Attorney's Office*, 370 F.3d 956, 963-64 (9th Cir.2004).

IV

The question remains, how specific must the right allegedly violated be defined in order to answer the question whether it was clearly established? *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) gives us a good example of the degree of specificity required. In *Wilson*, the Court concluded first that officers who took members of the media into a homeowner's home to observe and to record the execution of an arrest warrant did so in clear violation of the Fourth Amendment. Nevertheless, the Court concluded also that the officials who did so were entitled to qualified immunity. The Court said that the appropriate question "is . . . whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful. . . ." *Wilson*, 526 U.S. at 615, 119 S.Ct. 1692. Concluding that at the time of the violation the law was "at best undeveloped," the Court said, "Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'" *Id.* at 617, 119 S.Ct. 1692 (quoting *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978)).

From these precedents, I conclude that the proper question in this case is whether it was clearly established at the time of the events in this case that the Constitution prohibited persons in the position of *these* individual officials from engaging in any of the behaviors attributed to them in connection with the management and treatment of sexually violent predators civilly confined under state law for treatment and for the protection of the public. After reviewing all the relevant cases and authorities, I answer this question in the negative.

The analytical error made by my colleagues becomes apparent when they say,

> Thus, there are two bodies of law from which we might draw "clearly established" law for qualified immunity purposes: first, where the SVPs claim a violation of a right that is clearly established even in the prison context, and second, where the SVPs claim a violation of a right that is clearly established for all civilly detained persons.

What this acknowledges is that we cannot find any clearly established substantive rights in the SVP context, so we have to borrow them from other areas. An approach like this certainly works well when the unanswered question is what constitutional rights might these sexually violent predators have in this system, but it fails utterly when the issue is whether we hold individuals personally liable ex post facto for their actions.

This lawsuit should proceed so that specific answers can be found to the constitutional questions raised by the plaintiffs, but it should proceed only in connection with possible declaratory or injunctive relief. To do otherwise will deter government officials in the future from doing anything not to the liking of a sexually violent predator. The penalty for making a good faith mistake in an area of undeveloped law may be the costs of a lawsuit and the potential personal liability arising out of the official performance of a state job.

APPENDIX B

United States District Court
Central District of California
Western Division

JAMES HYDRICK, *et al.*, Plaintiffs, v. GRAY DAVIS, *et al.*, Defendants.	CV 98-7167 TJH (RNBx) **Order** (Filed Aug. 26, 2003)

The Court has considered Defendants' motion to dismiss, together with the moving and opposing papers.

It is Ordered that the entire motion to dismiss, including that part deemed to be a motion to decertify the class, be, and hereby is, **Denied**.

It is further Ordered that:

1. All class members shall be placed into two subclasses:

   A. Subclass A shall consist of all current class members with no right to opt-out and shall be entitled to seek injunctive relief for deprivation of their constitutional rights under 42 U.S.C. § 1983;

   B. Subclass B shall consist of all class members who do not opt-out of this subclass and shall be entitled to seek monetary relief

for deprivation of their constitutional rights under 42 U.S.C. §1983;

2. Class Counsel shall submit the proposed opt-out notice to the Court for approval within thirty days;

3. Any opposition to the proposed opt-out notice shall be filed within seven days after it is submitted by class counsel; and

4. Class Counsel shall notify the class members of their right to opt-out within thirty days after the Court approves the notice.

Date: August 26, 2003

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

APPENDIX C

LATHAM & WATKINS
Joel E. Krischer (CA Bar No. 066489)
Shireen B. Rahnema (CA Bar No. 198083)
Kathryn M. Davis (CA Bar No. 199494)
Stuart G. Nielson (CA Bar No. 218046)
Janda D. Robb (CA Bar No. 218109)
633 West Fifth Street, Suite 4000
Los Angeles, California 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

JAMES HYDRICK, *et al.*, Plaintiffs, vs. PETER WILSON, *et al.*, Defendants	CASE NO. CV 98-7167 TJH (RNBx) [~~PROPOSED~~] SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF; AND MONETARY DAMAGES CLASS ACTION (Filed Aug. 14, 2002)

Based on information and belief, Plaintiffs Joseph Carrocci, Roy Alvin Davis, Kenneth Herman, James Hydrick, Michael Ray Jackson, Trell James Mercer,

Jr., Terry Myers, Alan Rigby, and Frank Sisneroz ("Plaintiffs" or "Representative Plaintiffs"), for themselves and on behalf of all others similarly situated, allege against Defendants in their individual and official capacities, (1) Stephen Mayberg, Director of the California Department of Mental Health; (2) Cal A. Terhune, Director of the California Department of Corrections; (3) Jon DeMorales, former Executive Director of Atascadero State Hospital ("ASH"); (4) Craig Nelson, Senior Psychologist Specialist at ASH; (5) Grenda Ernst, Clinical Administrator at ASH; and (6) Melvin E. Hunter, Executive Director of ASH ("Defendants"), as follows:

NATURE OF THIS ACTION

1. This is a class action brought pursuant to 42 U.S.C. § 1983 and the Constitutions and laws of the United States of America and the State of California, on behalf of all individuals confined at ASH, presently and in the future, pursuant to the Sexually Violent Predator Act (the "SVP Act"), California Welfare & Institutions Code §§ 6600, *et seq.*, (the "SVPs"), as of September 2, 1997, the date specified in the Stipulation and Order Granting Class Certification filed on April 13, 2001. (The SVP Class is more fully defined in paragraphs 19-23.)

2. Defendants have failed to comply with the material provisions of the SVP Act, various other applicable provisions of the California Welfare & Institutions Code, and the Constitutions and laws of

the United States of America and the State of California, to the detriment of those confined pursuant to the SVP Act. Defendants have acted with knowing, reckless and callous disregard of the constitutional rights of SVPs, who are in the custody of the California Department of Mental Health pursuant to the SVP Act. Defendants' policies, practices and customs result in, among other things, conditions of confinement that are punitive in nature, that violate the rights of the SVPs and that render the SVP Act punitive as applied, as set forth more fully below.

JURISDICTION AND VENUE

3. This Court has subject matter and supplemental jurisdiction over the claims and causes of action described herein pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 1367(a) and 42 U.S.C. § 1983.

4. Venue is proper in the Central District of California because a substantial number of SVPs are confined at ASH, which is located therein.

5. Personal jurisdiction over Defendants is proper in this Court for the following reasons:

a. Defendants are domiciled within the State of California and are or were employed by the State of California at all times relevant to this suit.

b. Defendants' polices [sic] and practices affect institutions and individuals in the State of California.

c. Defendants establish(ed) and enforce(d) policies, practices and customs with the knowledge that such conduct has caused and will continue to cause injury in the State of California.

THE PARTIES

Representative Plaintiffs and the SVP Act

6. The Representative Plaintiffs who bring this action for themselves and on behalf of all others similarly situated (the "SVP Class" or the "SVPs"), defined *infra,* and who are confined at ASH pursuant to the SVP Act are: Joseph Carrocci, Roy Alvin Davis, Kenneth Herman, James Hydrick, Michael Ray Jackson, Trell James Mercer, Jr., Terry Myers, Alan Rigby, and Frank Sisneroz.

7. The SVP Act defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."

8. A "diagnosed mental disorder" includes "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."

9. "Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.

10. A "predatory" act is directed toward a stranger, a casual acquaintance, or a person with whom a relationship is established for the purpose of victimization.

11. The SVP Act outlines the commitment process for SVPs. Six months before being released from prison, a potential SVP is evaluated by the Department of Corrections, the Board of Prison Terms and the State Department of Mental Health. The district attorney or counsel for the county in which the person was convicted then files a petition for commitment. The Superior Court must determine whether there is probable cause to believe that the individual is likely to engage in sexually violent predatory criminal behavior upon his or her release. If the Superior Court determines that probable cause does not exist, it must dismiss the petition. If the Superior Court finds that probable cause does exist, it must order the person to remain in custody pending trial to determine whether the individual is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence. If the Superior Court or jury makes such a finding, then the person is committed for two years to the custody of the State Department of Mental Health for treatment and confinement in a facility designated by the Director of Mental Health. The person may not be held

longer than two years unless a new petition is filed and a subsequent extended commitment is obtained.

12. Once each year, the committed person has a right to a show cause hearing to determine whether facts exist to warrant a hearing on whether the person's condition has changed such that he or she does not pose a danger to the health and safety of others. If the Superior Court at the show cause hearing determines that probable cause exists to believe the person's condition has changed, then another hearing is held at which the State must show that the person remains a danger to the health and safety of others and is likely to engage in sexually violent behavior. If the Superior Court or jury finds against the committed person at the latter hearing, then the period of confinement shall run for two years from the date of this finding. If the Superior Court or jury finds for the committed person, then the person must be released.

13. All Representative Plaintiffs and other members of the SVP Class are or were held in custody pursuant to the SVP Act and are in various stages of the proceedings described above.

Defendants

14. Stephen Mayberg, Director of the California Department of Mental Health; Cal A. Terhune, Director of the California Department of Corrections; Jon DeMorales, former Executive Director of ASH; Craig Nelson, Senior Psychologist Specialist at ASH;

Grenda Ernst, Clinical Administrator at ASH; and Melvin Hunter, Executive Director of ASH, establish(ed) and enforce(d) the policies, practices and customs that determine the programming, treatment, location and conditions of confinement for all SVPs at all times relevant to this suit.

15. All members of the SVP Class are or were confined pursuant to the SVP Act and, thus, are directed to be in the custody of the State Department of Mental Health. The SVP Act authorizes the State Department of Mental Health to establish programming and treatment for all persons committed under the SVP Act. The SVP Act also authorizes the Director of the Department of Mental Health to determine the location where individuals are confined pursuant to the SVP Act.

16. Defendants are or were employees of the State of California, are or were clothed with the authority of state law and act(ed) under color of state law, that is, under color of the Constitution, statutes, laws, rules, regulations, and customs of the State of California at all times relevant to this suit.

17. Defendants' policies, practices and customs have created punitive and improper conditions that infringe on the rights of SVPs. Furthermore, Defendants personally knew of these conditions and punishments, and Defendants' disregard of such caused and continues to cause injuries to the SVPs as described herein. Finally, Defendants' pattern and practice of applying these conditions and punishments to

SVPs was applied and continues to be applied, with reckless and callous disregard of the rights of the SVPs.

18. To the extent that each Defendant infringed and infringes upon the rights of SVPs as established by the conditional and statutory standards described below, the Defendant acted in his or her official and/or his or her individual capacities.

CLASS ACTION ALLEGATIONS

Definition of the Plaintiff Class

19. Pursuant to Federal Rule of Civil Procedure 23(a), Plaintiffs bring this action for themselves and on behalf of a class of persons consisting of all individuals who are presently confined or who will be confined at ASH pursuant to any provision of the SVP Act, as of September 2, 1997 (the date specified in the Stipulation and Order Granting Class Certification filed on April 13, 2001). Plaintiffs requested certification pursuant to one or more of the statutory provisions as described below (hereinafter referred to as the "SVP Class"):

a. certification pursuant to Federal Rule of Civil Procedure 23(b)(3), or

b. certification pursuant to Federal Rule of Civil Procedure 23(b)(2), or

c. certification of one class pursuant to Federal Rule of Civil Procedure 23(b)(2) *and* a second

class pursuant to Federal Rule of Civil Procedure 23(b)(3).

20. The SVP Class, as defined herein, includes all individuals confined at ASH pursuant to the SVP Act, regardless of which of the aforementioned provisions provides the basis for class certification.

21. The SVP Class includes all individuals in custody at ASH pursuant to the SVP Act, regardless of their stage in the commitment process. For example, the SVP Class includes individuals awaiting their probable cause hearing, individuals awaiting their trial or commitment hearing, and individuals committed pursuant to the SVP Act.

22. The SVP Class includes all individuals confined at ASH pursuant to the SVP Act. However, on information and belief, some individuals have been and continue to be confined at locations other than ASH pursuant to the SVP Act. Plaintiffs may seek to expand the SVP Class to include all individuals confined pursuant to the SVP Act, including those confined at locations other than ASH, if such facts arise through discovery.

23. Plaintiffs and members of the SVP Class may also seek to amend this complaint further in order to establish subclasses including, but not limited to, one or more of the following:

a. A subclass of patients confined pursuant to the SVP Act who have not had their probable cause hearings;

b. A subclass of patients confined pursuant to the SVP Act who have had their probable cause hearings and are currently awaiting trial;

c. A subclass of patients who have had their probable cause hearings and commitment proceedings, and are confined as civil commitments pursuant to the SVP Act;

d. A subclass of patients confined to ASH pursuant to any provision of the SVP Act;

e. A subclass of patients confined to any location other than ASH pursuant to any provision of the SVP Act;

f. Any additional subclass or subclasses of patients confined pursuant to any provision of the SVP Act who have suffered injuries necessitating compensatory damages, to be determined at a later stage in these proceedings.

Rule 23(a) Prerequisites

24. The prerequisites to a class action under Rule 23(a) of the Federal Rules of Civil Procedure exist:

a. **Numerosity:** The members of the SVP Class are so numerous that joinder of all class members is impracticable. While the exact number of SVPs is unknown to the Representative Plaintiffs at this time, there are at least 250 individuals currently in custody at ASH pursuant to the SVP Act, an

unknown number currently being held at other locations, and potentially hundreds more that will be held at ASH and other locations in the future. Defendants are believed to have in their actual or constructive possession records that disclose information regarding, among other things, the names and locations of the SVPs currently confined pursuant to the SVP Act.

b. **Commonality:** Common questions of law and fact exist as to all members of the SVP Class and predominate over questions affecting individual members of the SVP Class. Questions of law and fact common to the SVP Class include, but are not limited to, the following:

(1) Whether the rights of SVPs pursuant to 42 U.S.C. § 1983 and/or the Constitution of the United States of America have been violated due to the policies, practices and customs of the Defendants;

(2) Whether the rights of SVPs, as civil commitments under the SVP Act, have been violated due to the policies, practices and customs of the Defendants;

(3) Whether the rights of SVPs pursuant to the Constitution of the State of California have been violated due to the policies, practices and customs of the Defendants;

(4) Whether the rights of SVPs have been violated due to policies, practices and customs of

the Defendants that determine confinement locations for SVPs.

c. **Typicality:** The claims of the Representative Plaintiffs are typical of the claims of all members of the SVP Class because all SVPs are or will be detrimentally affected by Defendants' policies, practices and customs as complained of herein. The claims of the Representatives Plaintiffs are also typical of the claims of the other members of the SVP Class in that the Representative Plaintiffs, like the other members of the SVP Class, are or will be confined pursuant to the SVP Act, and are or will be affected by Defendants' policies, practices and customs establishing the conditions of confinement for SVPs, as complained of herein.

d. **Adequacy of Representation:** The Representative Plaintiffs will fairly and adequately protect the interests of the SVP Class and are represented by counsel competent and experienced in litigation. The Representative Plaintiffs are members of the SVP Class with claims typical of the claims of all class members. The Representative Plaintiffs do not have interests that are antagonistic to or in conflict with those persons whom the Representative Plaintiffs seek to represent.

Rule 23(b)(2) Prerequisites

25. **Appropriate Relief:** To the extent that the SVP Class proceeds pursuant to Rule 23(b)(2), the

Defendants have created and enforced policies, practices and customs that are generally applicable to the SVP Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the SVP Class as a whole. More specifically, Defendants have created and will create, implement and enforce policies, practices and customs applicable to all members of the SVP Class. Similarly, Defendants have failed and will fail to create, implement and enforce appropriate policies, practices and customs applicable to all members of the SVP Class, as described more fully below.

26. **Notice:** On information and belief, Defendants maintain or have access to records containing information regarding, among other things, the names and locations of all individuals who are confined pursuant to the SVP Act and, thus, who are affected by the polices [sic] and practices complained of herein. If Defendants disclose the locations of current SVPs, notification can be provided by posting in a location accessible to class members at ASH and other facilities where SVPs are confined.

Rule 23(b)(3) Prerequisites

27. **Common Questions Predominate:** To the extent that the SVP Class proceeds pursuant to Rule 23(b)(3), questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The causes of action contained herein focus on the conditions of

confinement created by Defendants' polices [sic], customs, patterns and practices. All SVPs have been and will continue to be injured by these conditions, regardless of variations in the treatment of individuals. The Representative Plaintiffs and the individual class members do not have special interests or unique issues requiring separate litigation.

28. **Class Action is Superior:** A 23(b)(3) class action is superior to other available methods for the fair and efficient adjudication of this controversy because certification of a 23(b)(3) class will significantly reduce the number of individual claims for damages. Because damages are justified for the conditions and treatment which Defendants impose upon all SVPs, it is likely that individual claims for damages will need to be brought if class certification allows only declaratory or injunctive relief. Both equitable relief and monetary damages are necessary to remedy the gross infringement of the SVPs' rights caused by the Defendants. Class certification under 23(b)(3) would allow for declaratory and injunctive relief, as well as monetary damages. Because the claims contained herein address the conditions of confinement common to all SVPs at ASH, individual class members are unlikely to opt out of a 23(b)(3) class or attempt to bring individual claims for monetary damages. Certification of a 23(b)(3) class will prevent class members who do not opt out from bringing individual claims for damages, thus, significantly limiting duplication of effort and the possibility of inconsistent results. Thus, certification of a

23(b)(3) class is a superior means of managing these claims and adjudicating this controversy for all parties involved.

29. **Notice:** On information and belief, Defendants maintain or have access to records containing information regarding, among other things, the names and locations of all individuals who are confined pursuant to the SVP Act and, thus, who are affected by the polices [sic] and practices complained of herein. If Defendants disclose the names and addresses of past and current SVPs, notice and an opportunity to opt out can be provided as specified by the Court including, but not limited to, one or more of the following methods:

a. Notification by posting in a location accessible to individuals confined pursuant to the SVP Act at ASH and other facilities where SVPs are confined, and/or

b. Notification to the names and addresses, as disclosed by Defendants, of all past and current individuals confined pursuant to the SVP Act at ASH or otherwise, pursuant to the scope of the class certified, by individual letters describing the detailed relief sought in this complaint, and providing an opportunity to opt out of the SVP Class.

ALLEGATIONS COMMON TO ALL COUNTS/CAUSES OF ACTION

30. The SVPs are not criminals, are not accused of a crime, and are not penal commitments. Instead, they are held in custody, under a civil law (the SVP Act) and have been or are in the process of being *civilly* committed. Members of the SVP Class have fully completed their penal sentences after being convicted of the crimes described in the SVP Act. Many SVPs are presently in custody at ASH. However, an unknown number of SVPs are in custody at various other facilities within the State of California, including state penitentiaries and prisons.

Patient Population at ASH

31. The patient population at ASH consists of male penal and civil commitments who are confined under a variety of statutes. For example, patients are held at ASH pursuant to the following provisions:

a. Patients committed pursuant to California Penal Code § 1026 have been found "not guilty by reason of insanity" and are held at ASH;

b. Patients confined pursuant to California Penal Code § 1370 have been found to be "incompetent to stand trial" and are among those held at ASH;

c. Patients confined pursuant to California Penal Code § 2684 are mentally ill prisoners who have been transferred to ASH from the Department of Corrections for psychiatric stabilization;

d. Patients confined pursuant to California Penal Code § 2962 and § 2964 are "mentally disordered offenders" who serve their parole time at ASH from the Department of Corrections;

e. Patients confined pursuant to California Welfare & Institutions Code § 6316 have been found to be "mentally disordered sex offenders" and are among those held at ASH.

Patients' Rights and the Patients' Access System

32. The written policies of the Defendants include the following:

33. ASH's Administrative Directive No. 602 lists the following rights of patients involuntarily detained: the right to treatment services that are provided in ways least restrictive to personal liberty; the right to dignity, privacy, and humane care; the right to be free from harm including excessive restraints, isolation, medication, abuse or neglect; the right to be free of medication as a form of punishment or for staff convenience; the right to prompt medical care; the right to religious freedom and practice; the right to participate in appropriate programs of publicly supported education; the right to social interaction and physical exercise; and the right to be free from hazardous procedures.

34. ASH's Administrative Directive No. 602 provides that the following rights of patients are

restricted at ASH: the right to wear their own clothes; the right to keep and use their own personal possessions and toilet articles; the right to keep and spend reasonable amounts of their own money; the right of access to individual storage space; the right to see visitors each day; the right of reasonable access to telephones to make and receive confidential calls; the right of access to letter writing materials; the right to refuse convulsive treatment; the right to refuse psychosurgery; the right to see and receive the services of a patient advocate; and the right to mail and receive unopened correspondence.

35. According to ASH's Administrative Directive No. 602, a patient's rights may be denied for "good cause," and upon recommendation of the patient's "Interdisciplinary Team" and psychiatrist. A patient's "Interdisciplinary Team" is a group of ASH staff members who have the authority to make decisions affecting all aspects of a patient's confinement and treatment.

36. ASH's Administrative Directive No. 602 also states that in emergencies, a right may be denied immediately by staff for no longer than twenty-four hours after the emergency action.

37. Finally, ASH's Directive No. 602 declares that a right shall not be withheld or denied as a punitive measure or for treatment purposes.

38. All patients confined at ASH are subject to the "Patient Access System," which assigns each patient an "Access Level" with corresponding rights

and privileges. All patients must sign out whenever they leave their unit (group living space) and sign in whenever they reach their destination. However, a "Level 1" patient may not leave his unit without a staff escort. A "Level 2" patient wears a red card and may leave his unit only to go to one of a limited number of destinations, not including the courtyard or canteen. A "Level 3" patient wears an orange card and may go to limited destinations, which may or may not include the law library, canteen or courtyard.

39. According to ASH's "Patient Access System Manual," a patient's "Level" may be reduced after review by his "Interdisciplinary Team."

40. As applied to SVPs, the Patient Access System and other conditions of confinement are punitive in nature and hinder their treatment, and thus are improper when imposed on this class of civil commitments. These conditions are outlined in the following sections.

Treatment Program and Phases

41. Members of the SVP Class confined at ASH are required to undergo a treatment program that includes five phases.

42. Phase One consists of group SVP sessions that provide each SVP with ASH's interpretation of the SVP Act. If a member of the SVP Class does not attend his "treatment" session, his Access Level is reduced and corresponding privileges are revoked. If

the SVP does attend his treatment session but merely sits quietly without participating, he is said to be "not progressing" in his treatment. This finding that an SVP is "not progressing" in his treatment is used against him in probable cause and confinement hearings, and prevents him from advancing to Phase Two of the Treatment Program.

43. In order to advance from Phase One of the treatment program, each SVP at ASH must sign a "contract" or statement prepared by ASH's staff which, in effect, acknowledges that the SVP has a "problem" or "illness" and needs "help" or "treatment" at ASH. This signed statement is used against the individual SVP in his probable cause and confinement hearings. Furthermore, an individual SVP who refuses to sign this statement is said to be "not progressing" with his treatment. This purported lack of progress is also used against SVPs in their probable cause and confinement hearings.

44. The contents of Treatment Phases Two through Five involve "cognitive" treatments, including the viewing of videos depicting inappropriate or violent sexual activities and the corresponding application of strong or repugnant odors, or some other unpleasant sensation, designed to elicit a negative association. There are no established criteria for evaluation of success under this treatment.

45. Defendants' policies indicate that upon successful completion of Phase Five, the individual SVP will be released into the community under

the direction of the Conditional Release Program ("CONREP"). In anticipation of this release, SVPs meet with representatives from CONREP to prepare for their eventual release. According to representatives from CONREP, however, no SVPs have been or will ever be accepted into CONREP.

46. The staff at ASH have been given the discretion to determine when individual SVPs have successfully completed the treatment program and are qualified for release. At this time, only a handful of SVPs have been allowed into Phase Four and no SVPs have been released under the treatment protocol.

Punitive Conditions and Improper Punishments

47. In practice, all of the previously mentioned rights and privileges are restricted and denied as a means to punish SVPs who object to mandatory treatment, arbitrary rules and disciplinary procedures, as well as to punish SVPs for filing this and other lawsuits challenging conditions of their confinement. This includes polices [sic] and practices that permit "Access Level" reductions when SVPs refuse to participate in treatment sessions.

48. In contrast to ASH's Administrative Directives previously discussed, Defendants' policies, practices and customs permit and encourage the involuntary medication of SVPs with psychotropic

drugs in non-emergency situations for the convenience of staff and as a means of punishment.

49. Defendants' policies, practices and customs subject SVPs at ASH to forced integration with the other patients, including the penal commitments, despite Defendants' knowledge that this jeopardizes the health, safety and treatment of the SVPs. SVPs share living, dining, bathing and recreation facilities with individuals serving criminal sentences, and SVPs are subject to either the same or more restrictive conditions as the penal commitments. Many of the conditions are more degrading, arbitrary and/or restrictive than those at California prisons.

50. SVPs held at locations other than ASH are subject to prison conditions that are punitive by design. Even though they are held in custody pursuant to a civil law, members of the SVP Class that are held at other locations are subject to conditions including, but not limited to, the following: shackles during transport and visits from family and friends; housing with prisoners; prison rules designed for punitive purposes; and the denial of treatment and other rights that must be provided to civil commitments.

51. The treatment Phases as previously described create a "Catch-22" for the SVPs. In effect, these Phases function to ensure that members of the SVP Class are never released. In order to move out of Phase One, SVPs must sign a statement acknowledging their need for confinement and treatment at ASH.

Because this statement is used against SVPs in probable cause and commitment hearings, SVPs are reluctant to sign the statements. If an SVP does not sign the statement, he may not move on to Phase Two and he is said to be not progressing in his treatment. If an SVP does sign the statement, he is considered as having admitted his need for treatment at ASH and can only be released after finishing all phases of treatment at ASH, and upon the approval of the staff at ASH. Furthermore, the SVP treatment program, as applied, is intended to confine SVPs indefinitely, as a form of punishment.

52. Such punitive treatment is, by design, not therapeutic in nature. Defendants' policies, practices and customs disregard the rights of SVPs by allowing and encouraging these punitive and improper conditions of confinement.

Unsanitary and Degrading Conditions that Hinder Treatment

53. Members of the SVP Class are unnecessarily exposed to bodily wastes and fluids including feces, urine, vomit, spit and blood in all areas of ASH, including, but not limited to, the courtyards, bathrooms, hallways and dining rooms. This lack of sanitation at ASH exposes those confined at ASH to tuberculosis, hepatitis and other communicable diseases, thus posing a serious health risk upon them.

54. Certain patients, usually criminal commitments, are employed to serve the food and clean the facilities. The food served to SVPs is often contaminated with spit, urine, rocks, sticks and hair. In addition to contamination due to poor hygiene, the food servers often openly spit in the portions served to SVPs as the SVPs stand in line. Defendants have personal knowledge of this conduct, but Defendants' policies, practices and customs permit and encourage this and other harassment of SVPs.

55. SVPs at ASH are not protected from the penal commitments, including in the courtyard and gymnasium, and the SVPs are subjected to their verbal harassment, physical abuse and sexual assaults. They are targeted and harassed by both patients and staff members because they are openly labeled "sexually violent predators," including by ASH staff. Defendants have personal knowledge of these abuses but Defendants' policies, practices, customs and disregard for the rights of the SVPs permit and encourage the abuse of SVPs.

56. Red light alarms, where approximately ten to twenty staff members surround, restrain and remove the patient, are common at ASH. Such alarms and other tactics are used even when, for instance, a member of the SVP Class orally refuses to participate in a group therapy session even though the SVP does not use forceful resistance.

57. Defendants' policies, practices and customs permit and encourage the regular and public overreaction to the SVPs, often in the form of red light alarms, excessive restraints and forced medication as a means of threatening and intimidating members of the SVP Class. This type of intimidation affects all witnesses to such actions, regardless of whether or not individuals have themselves been subjected to forced medication.

58. Defendants' policies, practices, customs, as well as the reckless and callous disregard for rights of the SVPs, are demonstrated by the punitive, degrading and antitherapeutic conditions described herein.

Conditions and Restrictions Improperly Applied to SVPs

59. The policies, practices and facilities at ASH, some of which may or may not be sufficient for penal commitments, are improper when applied to SVPs.

60. For example, bedrooms do not have electrical outlets, running water, tables or chairs, and cannot be locked from the inside. SVPs are not permitted to wear their own clothes or keep many of their own possessions, regardless of their past behavior.

61. Similarly, SVPs are required to keep their rooms lit all night long, regardless of their past behavior.

62. SVPs only have access to phones that use a recording informing the recipient that the call has been placed from a correctional facility. Phone conversations are not private and can be overheard by the staff and other patients.

63. Members of the SVP Class are rarely offered occupational or vocational opportunities and services. Because SVPs are civil commitments, they must be paid minimum wage (rather than prison wage). For this and other reasons, including punishment and harassment, only a few SVPs have been given jobs at ASH.

64. Upon arrival at ASH, SVPs are subjected to degrading public strip searches and the use of four-point restraints. SVPs are also subject to unnecessary and arbitrary searches of their personal belongings.

65. The personal belongings of SVPs are improperly seized and their use unnecessarily restricted, without regard to the histories and risks of individual SVPs.

66. The resources in the law library are insufficient and access to SVPs is improperly restricted.

67. The ability of SVPs to see visitors and spend funds are also improperly restricted and denied.

68. These and other conditions and restrictions are unreasonable and improperly applied to members of the SVP Class.

FIRST ALLEGED CLAIM

(Violations of First and Fourteenth Amendments of the United States Constitution)

69. Plaintiffs incorporate herein Paragraphs 1 through 68 of this Second Amended Complaint.

70. Defendants' policies, practices and customs permit and encourage the punishment of members of the SVP Class for the mere expression of their beliefs, including, but not limited to, punishment for refusing treatment.

71. Defendants' policies, practices and customs include punishments and restrictions that constitute improper interference with the ability of SVPs to assemble peaceably, access the courts, petition the government and refuse treatment.

72. Defendants have personal knowledge of retaliation against members of the SVP Class for participation in lawsuits, but Defendants' policies, practices and customs permit and encourage retaliation.

73. The aforementioned deny the SVPs the rights and protections provided by the First Amendment of the Constitution of the United States of America and Article 1, Section 2 of the Constitution of the State of California.

SECOND ALLEGED CLAIM

(Violations of the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, Section 13 of the California Constitution)

74. Plaintiffs incorporate herein Paragraphs 1 through 73 of this Second Amended Complaint.

75. Defendants' policies, practices and customs subject SVPs to unreasonable searches; searches as a form of punishment; degrading public strip searches; improper seizures of personal belongings; and the use of unreasonable force and physical restraints. These policies, practices and customs subject members of the SVP Class to unreasonable searches and seizures, and the unreasonable use of force.

76. The aforementioned denies the SVPs the rights and protections provided by the Fourth Amendment of the Constitution of the United States of America and Article 1, Section 13 of the Constitution of the State of California.

THIRD ALLEGED CLAIM

(Violation of the Ex Post Facto Clause of the United States Constitution)

77. Plaintiffs incorporate herein Paragraphs 1 through 76 of this Second Amended Complaint.

78. Because Defendants' policies, practices and customs, as applied, do not grant the SVPs the same

status as other civil commitments, do not employ the least restrictive treatments, are not compatible with treatment purposes, are not reasonably related to a legitimate non-punitive goal, and do not comport with substantive due process, they constitute a form of punishment. Furthermore, the conditions of confinement for SVPs are punitive and often more restrictive than the conditions applied to penal commitments and prisoners.

79. The aforementioned subject the SVPs to conditions of confinement that are punitive in nature. Thus, these conditions deny the SVP Class the rights and protections provided by the Ex Post Facto Clause of Article 1, Section 10 of the Constitution of the United States of America.

FOURTH ALLEGED CLAIM

(Violations of the Double Jeopardy Clause of the Fifth Amendment and the Fourteenth Amendment of the United States Constitution)

80. Plaintiffs incorporate herein Paragraphs 1 through 79 of this Second Amended Complaint.

81. As described in the THIRD ALLEGED CLAIM, incorporated herein, Defendants' policies, practices and customs, as applied, subject the SVPs to conditions of confinement that are punitive in nature.

82. The aforementioned punitive conditions deny the SVP Class the rights and protections provided by the Double Jeopardy Clause of the Fifth

Amendment of the Constitution of the United States of America.

FIFTH ALLEGED CLAIM

(Violations of the Eighth and Fourteenth Amendments of the United States Constitution)

83. Plaintiffs incorporate herein Paragraphs 1 through 82 of this Second Amended Complaint.

84. Defendants' polices [sic] and practices subject SVPs to restrictive and degrading conditions that constitute cruel and unusual punishment, including, but not limited to, the following: contaminated food, inadequate facilities, excessive punishments, unnecessary restrictions on movement and exercise, improper restrictions on movement, unnecessary seclusion, discriminatory work assignments, forced medication, forced treatment, improper restrictions on law library access, degrading public strip searches and excessive use of force and physical restraints. Furthermore, the Defendants' polices [sic] and practices permit and encourage the reduction of privileges and unnecessary restrictions in response to any SVP's unwillingness to conform to Defendants' program of rehabilitation, in violation of the Eighth Amendment. Finally, the level of violence tolerated at ASH and the failure to protect members of the SVP Class constitute examples of cruel and unusual punishment.

85. The aforementioned denies the SVP Class the rights and protections provided by the Eighth

Amendment of the Constitution of the United States of America.

SIXTH ALLEGED CLAIM

(Violations of Procedural Due Process Under the Fourteenth Amendment of the United States Constitution)

86. Plaintiffs incorporate herein Paragraphs 1 through 85 of this Second Amended Complaint.

87. Defendants' policies, practices and customs deprive SVPs of procedural due process under the Fourteenth Amendment. For example, SVPs experience Access Level reductions, forced treatment, forced medication, unnecessary restrictions on movement, loss of privileges, confiscation of belongings and other punishments all without advance written notice, an opportunity to present evidence on their behalf, a written statement of reasons for disciplinary action and other relevant safeguards. These polices [sic] and practices deprive SVPs of their liberty and property interests without due process of law.

88. The aforementioned denies the SVP Class the rights and protections provided by the Fourteenth Amendment of the Constitution of the United States of America.

SEVENTH ALLEGED CLAIM

(Violations of Substantive Due Process Under the Fourteenth Amendment of the United States Constitution)

89. Plaintiffs incorporate herein Paragraphs 1 through 88 of this Second Amended Complaint.

90. Defendants' policies, practices and customs subject SVPs to conditions of confinement that are the same and often worse than the conditions under which penal commitments and prisoners are held. The policies, practices and conditions complained of herein, such as forced medication, forced treatment, improper punishments, unsanitary facilities, contaminated food, unrestrained abuses and the tolerance of assaults, are shocking because they are arbitrarily applied to *civil* commitments intended to be confined to a hospital for treatment purposes.

91. The aforementioned denies the SVP Class the rights and protections provided by the Fourteenth Amendment of the Constitution of the United States of America.

EIGHTH ALLEGED CLAIM

(Violations of Equal Protection under the Fourteenth Amendment of the United States Constitution)

92. Plaintiffs incorporate herein Paragraphs 1 through 91 of this Second Amended Complaint.

93. Defendants' policies, practices and customs subject the SVPs to more restrictive, punitive, and degrading conditions than other civil commitments, thus, denying the SVPs equal protection of the laws. Furthermore, other civil commitments, and often penal commitments, receive greater privileges, rights and, as relevant, more humane and proper treatment than the SVPs.

94. The aforementioned denies the SVP Class the rights and protections provided by the Fourteenth Amendment of the Constitution of the United States of America.

NINTH ALLEGED CLAIM

(Violations of the Sixth and Fourteenth Amendments of the United States Constitution)

95. Plaintiffs incorporate herein Paragraphs 1 through 94 of this Second Amended Complaint.

96. Defendants' policies, practices and customs include punishments and Access Level reductions that improperly deny or restrict the ability of SVPs to access the legal library and receive legal assistance.

97. Defendants' policies, practices and customs interfere with communications between SVPs and legal personnel by requiring ASH staff to open and view all mail, including mail protected by the attorney-client privilege.

98. Finally, SVPs have experienced Access Level reductions, restrictions of privileges, transfers, harassment and other improper punishments in retaliation for bringing this and other lawsuits.

99. These policies, practices and customs interfere with the ability of SVPs to access the courts and assist counsel in their own defense.

100. The aforementioned denies the SVPs the rights and protections provided by the Sixth Amendment of the Constitution of the United States of America.

TENTH ALLEGED CLAIM

(Violation of the Right to Privacy)

101. Plaintiffs incorporate herein Paragraphs 1 through 100 of this Second Amended Complaint.

102. Defendants' policies, practices and customs do not permit privacy in situations including, but not limited to, the following: when showering, sleeping, using the toilets or participating in therapy sessions. SVPs are denied privacy irrespective of their individual histories relating to safety and security.

103. The aforementioned denies the SVPs the rights and protections provided by the Fourteenth Amendment of the Constitution of the United States of America and Article 1, Section 1 of the Constitution of the State of California.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants on all alleged claims, as follows:

1. Compensatory, punitive and other monetary damages for the conditions of confinement infringing on the rights of and injuring all class members as described herein, in an amount yet to be determined;

2. Declaratory and injunctive relief requiring Defendants to establish and enforce polices [sic] and practices that respect and guarantee the rights of Plaintiffs as civil commitments, including, but not limited to, the following:

a. Injunctive relief requiring living, eating, recreation and all other facilities that are separate from penal commitments and prisoners;

b. Injunctive relief requiring humane, safe and sanitary conditions that are therapeutic, rather than punitive, and that respect the dignity and privacy of Plaintiffs;

c. Injunctive relief requiring humane, safe and sanitary living conditions in accordance with the rights provided by the Constitutions and laws of the United States of America and the State of California;

d. Injunctive relief requiring the use of the least restrictive means necessary to achieve the civil purposes of confinement;

e. Injunctive relief requiring Defendants to respect and guarantee the right of members of the SVP Class to refuse treatment;

f. Injunctive relief requiring Defendants to protect members of the SVP Class from verbal and physical harassment and abuse by other patients and staff;

g. Injunctive relief providing members of the SVP Class an opportunity to work and earn a wage during their confinement at ASH;

h. Injunctive relief requiring Defendants to respect and guarantee the rights and address the grievances discussed herein, to be specified at a future date;

3. Ancillary damages, equitable monetary relief and punitive damages where applicable for the conditions of confinement infringing on the rights of individual SVP Class members as described herein, in an amount yet to be determined;

4. Attorneys' fees under 42 U.S.C. § 1988, in an amount which this Court deems just, equitable and proper;

5. That a class be further certified in accordance with the Stipulation and Order Granting Class Certification filed on April 13, 2001, with class relief for compensatory, punitive and other monetary damages where applicable for the conditions of confinement and injuries to the class in an amount yet to be determined; and

6. Such other and further relief as the Court deems just, equitable and proper.

Dated: June 3, 2002

LATHAM & WATKINS
Joel E. Krischer
Shireen B. Rahnema
Kathryn M. Davis
Stuart G. Nielson
Janda D. Robb

By /s/ Stuart G. Nielson
Stuart G. Nielson
Attorneys for Plaintiffs

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins, 633 West Fifth Street, Suite 4000, Los Angeles, CA 90071-2007.

On **October 1, 2002**, I served the following document described as:

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF; AND MONETARY DAMAGES (CLASS ACTION)

by serving a true copy of the above-described document in the following manner:

BY HAND DELIVERY

I am familiar with the office practice of Latham & Watkins for collecting and processing documents

for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

Melvin E. Hunter, in his individual and official capacity; Jon DeMorales, in his individual and official capacity; Craig Nelson, in his individual and official capacity; and Grenda Ernst, in her individual and official capacity

c/o Eric D. Bates, Esq.
or Karen Ackerson-Brazille, Esq.
or Randal Murphy, Esq.
Office of the Attorney General
300 South Spring Street, Suite 5212
Los Angeles, CA 90013

I affirm that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made

and affirm under penalty of perjury that the foregoing is true and correct.

Executed on **October 1, 2002**, at Los Angeles, California.

/s/ George L. MacDonell
George L. MacDonell